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Have the U.S. Supreme Court's 5th Amendment Takings Decisions Changed Land Use Planning in California?

By Daniel Pollak

MARCH 2000

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C A L I F O R N I A R E S E A R C H B U R E A U

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PART I. INTRODUCTION

“On the surface, the most important change in California planning during the late ‘80s was the shifting balance of power between property owners and the government planners who regulate their activities.”

-William Fulton, Guide to California Planning¹

“Over the last decade, the U.S. Supreme Court has issued an unbroken string of decisions expanding public liability under the takings clause of the Fifth Amendment for environmental and land-use regulations that impinge on private property interests, undermining the ability of the government to adopt new environmental protection standards.”

John Echeverria, Director, Environmental Policy Project,
Georgetown University Law Center²

“Unfortunately, the courts have been locked into what the Supreme Court itself has called 70-odd years of ad hoc regulatory takings jurisprudence. As a result, they give relief in only a limited range of cases. That means that property owners, both large and small, bear the full costs of the public goods the regulations bring about, when in all fairness those costs should be borne by the public that orders those goods in the first place.”

Roger Pilon, Director, Center for Constitutional Studies,
Cato Institute³

Purpose of the Study

What are the impacts of the U.S. Supreme Court takings rulings on California land use planning and regulation? The purpose of this study is to bring some empirical evidence to bear on this question. A series of key Supreme Court decisions on takings, starting in 1987, was expected by many to have profound effects. Property rights advocates hoped the new rulings would curb overzealous regulators. Many environmentalists and planners feared that these rulings would have a “chilling effect” on the legitimate exercise of regulatory authority by local governments.

The Supreme Court’s rulings on takings are of particular importance in California. Proposition 13 has reduced the ability of local governments to finance public goods and infrastructure through local tax revenues. Local governments responded by increasing their reliance on fees and exactions.⁴ The constitutional takings clause may represent yet another limitation on the ability of local governments to finance public improvements.

In addition, California’s burgeoning population and prized scenic and natural resources make it fertile ground for the conflicts associated with growth: how should transportation infrastructure and other public services be financed as communities spread outward?

How should open space, habitat, and access to recreational resources be preserved and paid for? Takings rules can constrain how local governments deal with such questions.

Some have predicted or described dire effects from the Supreme Court takings rulings. Others have said the rulings didn't go far enough and call for legislation to further bolster property rights. This study is intended to provide a broader basis of evidence for such discussions.

This study thus differs from most of the literature on takings, which generally focuses on legal issues. This study leaves those questions aside, looking instead at how takings issues^{*} have actually affected city and county land use regulation in California.

Overview of This Report

My research addresses the following questions:

- *Visibility of takings issues:* Are takings issues a prominent feature of land use issues today? To what degree have local governments taken notice of the Supreme Court rulings? Have the Supreme Court rulings created pressure on local governments to change their practices, decisions or policies?
- *Impact of takings issues on land use planning and regulation:* Have the takings rulings influenced how local governments plan and regulate land use? Have they made local governments more cautious? Has the fear of litigation created a chilling effect? How have local governments adapted to the changing legal climate?
- *Exactions:* Have the takings rulings had an impact on how local governments use exactions? Have the rulings in any way inhibited their use of exactions as a tool for financing public infrastructure and services?
- What are the *policy implications* of these changes?

I investigated these questions in two ways:

- 1) With a survey questionnaire mailed to all of California's city and county planning directors; and
- 2) With a series of six case studies that offer a more detailed look at the influence of takings issues.

The report is organized as follows:

- Part I: Introduction (this section) - including a brief review of the legal context of the takings issue.

^{*} Unless otherwise stated, the terms "takings issues" or "the takings issue" encompass both takings as a set of legal doctrines, and takings as a topic of discussion and debate in local land use planning.

- Part II: The survey – what we asked, why we asked it, and what we found out.
- Part III: The case studies – detailed narratives of episodes in six cities or counties in which takings issues had an impact on local land use planning.
- Part IV: Discussion of the research results and their implications
- Appendices: The survey questionnaire, plus additional survey results and statistical analysis.

Before presenting the survey results, I will review the basic legal and land use planning concepts involved. Readers familiar with these subjects may wish to skip ahead to Part II.

Legal Background and Context

What are “Takings” and Why Do They Matter?

The concept of regulatory takings is rooted in the Fifth Amendment of the U.S. Constitution, which states, “nor shall private property be taken for public use, without just compensation.” In a 1922 decision,^{*} the U.S. Supreme Court ruled that this clause could be applied not only to physical seizure of property, but also to land use regulation: “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”

This ruling is of particular importance for local governments in California because they are the primary land use regulators. If, in exercising this power, they “go too far” and unconstitutionally deprive a property owner of their Fifth Amendment rights, they can be sued and ordered to pay compensation. Many government regulations have the effect of reducing somebody’s property value. In theory at least, the takings clause could require government to compensate landowners for losses in property value resulting from a wide variety of commonly enforced regulations.

This could be very costly for local treasuries. Or, it could create a “chilling effect”: local governments making decisions not out of regard for good public policy, or in response to the needs of their constituents, but merely to avoid litigation risks.

What Kinds of Regulations Can be Takings?

The authority to regulate land use derives from both common law and the California Constitution, which grant cities and counties a “police power” to enforce regulations to protect the public health, safety, and welfare.⁵ In the area of land use, local governments exercise the police power in a variety of ways, including:

^{*} Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

- *General and specific plans*, which lay out a blueprint for the community. These designate, among other things, the allowed land use types and densities for particular areas.
- *Zoning ordinances*, which implement the general plan by regulating the use of specific parcels;
- *Subdivision approvals*, which grant an owner the right to divide his or her land into multiple parcels (a necessary precursor to selling parcels or building a housing development).
- *Conditional use permits and variances*, by which the government agency can grant individual exceptions to the requirements of the zoning ordinance.
- *Building permits*, which grant permission to build structures or improvements that are found to be consistent with zoning and the general plan.
- *Other ordinances* can impose additional regulations such as rent control and architectural design standards.

In addition, a key element of land use regulation that is important here is the power to *exact fees or dedications* from property owners or developers as a condition of approval for their development plans. An applicant for a permit, variance, or subdivision approval can be required by the government agency to pay fees to help finance public infrastructure and services such as roads, affordable housing, or public transportation. Or, the exaction can consist of in-kind contributions of public improvements or land. Contributions of land often take the form of easements or right-of-ways for purposes such as stream setbacks or the widening of roads. Exactions that are excessive or inappropriate can be ruled a violation of the takings clause. Takings issues can thus affect not only how local governments plan their communities, but also their ability to provide services and infrastructure.

An additional area in which takings can have an impact is on environmental and natural resource protections. Local governments often use their land use regulatory powers to protect natural resources or the environment. This is sometimes a consequence of mandates such as the state and federal Endangered Species Acts, or the California Environmental Quality Act (CEQA). Local governments also often impose environmental and natural resource protections in order to further local goals such as the provision of parks and open space.

The Basics of Takings Law

A series of U.S. Supreme Court decisions have created a complex body of law governing what sorts of regulations “go too far” and cross the line to become a compensable taking.

While a complete survey of takings law is beyond the scope of this study, it is helpful to review some of the key rulings. These are important both for the legal principles they

establish, and because the cases are well-known examples that influence how regulators, property owners, judges and lawyers interpret takings law.

These rulings consist primarily of a series of efforts to resolve the question, when does a government regulation become a taking, and thus require the “just compensation” guaranteed by the Fifth Amendment? I will present brief summaries of several pivotal cases and the principles they established.*

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)

Situation: This lawsuit concerned a state law prohibiting subterranean mining underneath buildings or streets that would be in danger of subsiding into the mine shafts. The Court ruled that where the coal companies retained rights to mine underneath these properties, the government would have to compensate them for the lost property rights.

Key Principle: The ruling established the principle that, although property may be regulated, a regulation that “goes too far” will become a taking.

Agins v. City of Tiburon, 447 U.S. 255 (1980)

Situation: The City of Tiburon adopted ordinances placing the Agins’ property in a more restrictive zone. Resulting density restrictions limited the number of houses they would be able to build. The Court ruled that this was *not* a taking.

Key Principle: This ruling established a two-pronged test: a regulation becomes a taking only if either (1) it does not substantially advance legitimate state interests or (2) it denies an owner all economically viable uses of the land.

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)

Situation: A flash-flood destroyed a church-operated campground located in a flood plain. In response, the County adopted a moratorium on rebuilding in the area. The Church unsuccessfully challenged this as a taking.

Key Principles: Although the plaintiffs lost the case, the Court ruled that the government must pay monetary compensation for an unlawful taking, even a temporary one. Simply removing the offending regulation would not be sufficient redress.

Nollan v. California Coastal Commission, 483 U.S. 825 (1987)

Situation: The Nollans sought a permit from the California Coastal Commission to demolish a bungalow and build a larger home on an oceanfront lot. The Commission

* These summaries draw heavily from “The Basics of Takings Law,” Community Land Use Project of California, League of California Cities, 1999. For a more in-depth review of the evolution of takings law, see Robert Meltz, Dwight H. Merrimam, and Richard M. Frank, *The Takings Issue*, (Washington, D.C.: Island Press, 1999), ch. 12.

approved the development on the condition that the Nollans dedicate an easement across their private beach to allow public access. The majority opined that the proposed exaction amounted to an “out-and-out plan of extortion” since there was no obvious relationship between the impact of the proposed development and the public interest in obtaining a beach access easement.

Key Principle: *Nollan* established that there must be an “essential nexus” – the exaction sought must be directly related to the public burden imposed by the development.

Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992)

Situation: The state adopted strict shoreline development regulations in areas vulnerable to hurricane damage. The landowner sued because the regulations prevented him from building houses on two beachfront lots in a developed subdivision. The Court did not dispute that the regulations served a valid public purpose, but concluded that Lucas was entitled to compensation because the regulation had rendered his property valueless.

Key Principle: In cases where the government action amounts to a total wipeout of all beneficial use of the property it is automatically a taking (except in certain narrowly defined circumstances such as when the regulation in question addresses a public nuisance).

Dolan v. City of Tigard, 512 U.S. 374 (1994)

Situation: The city of Tigard, Oregon imposed two exactions in approving an expansion of a plumbing and electrical supply business on property that abutted a creek. The first was the dedication of land for improvement of a storm drainage system along the creek, and the second was a dedication of a 15-foot-wide strip of land for a bike path near the creek. The Court held both exactions invalid. Although flood control was a valid concern, the Court said that mere regulation of the land, rather than dedication, would have been sufficient. As for the bike path, the city ruled that the city had not met its burden of demonstrating that the bicycle path would offset car and bike trips generated by the expansion of the business. In other words, the essential nexus or connection existed, but the proposed exactions went too far.

Key Principle: *Dolan* established the need for “rough proportionality” between the impact of the development and the magnitude of the exactions imposed.

Suitum v. Tahoe Regional Planning Agency, 117 S. Ct 1659 (1997).

Situation: The planning agency adopted a regional plan that designated Suitum’s small parcel as a protected Stream Environment Zone, thwarting her plan to build a home. Acknowledging this was a taking, the TRPA offered transferable development rights that could be sold to other property owners as compensation. Suitum sued, claiming this was not sufficient compensation. The TRPA claimed the case would not be “ripe” for judicial review unless Suitum ascertained the market value of the transferable development rights by attempting to sell them. While the Supreme Court upheld Suitum on that issue, the case was eventually settled out of court.

Key Principle: The case called into question the use of Transferable Development Rights to compensate for a taking, but the outcome was inconclusive.

Del Monte Dunes v. City of Monterey, 119 S. Ct. 1624 (1999)

Situation: Beginning in 1981, owners of a 37.6-acre parcel applied to the city to build a multi-family residential development. After a protracted history of rejected applications and policy reversals by the city, the owners sold the land at a profit for use as a state park. However, they sued, claiming a taking because of the regulatory delays and the denial of permission to build.

Key Principles: The ruling established that under some circumstances takings plaintiffs may have a right to a jury trial. It also established that the *Dolan* rough proportionality standard is not applicable to permit denials.⁶

The Effects of the Supreme Court Rulings

These rulings have created a much-discussed, sometimes confusing body of takings precedents. In particular, the series of rulings dating from 1987 on are widely interpreted as establishing a fundamentally new legal climate for takings claims. Overall, these decisions are usually interpreted as having advanced the cause of property rights against government regulation. Some observers worry that local governments would be forced to retreat from their proper regulatory role, or else face crippling takings liability. Property rights advocates have hoped that the rulings would rein in government excesses. Some among them worried that the decisions don't go far enough and have pushed for legislative adoption of even stronger property rights protections.

Of the recent decisions, the *Nollan*, *Dolan* and *First English* cases are perhaps the most important and controversial. *Nollan* and *Dolan* opened the door to challenging a variety of fees and exactions that had become routine in land use planning in California. *First English* raised the stakes for all forms of regulation by establishing that a successful takings lawsuit could expose fiscally-strapped cities and counties to monetary liability should they overstep the bounds of the Fifth Amendment.

The changing climate was reinforced in California with the passage in 1987 of the Mitigation Fee Act (AB 1600).⁷ Backers of this law were motivated in part by property rights arguments, and in part because of pressure from developers and builders to do something about rising development impact fees. Developers and builders contended that local governments were forcing them to pay an unfair share of the cost of public infrastructure and services. AB 1600 codified standards for the imposition of impact fees that closely resemble the nexus and rough proportionality standards required by the *Nollan* and *Dolan* decisions.*

One of the main legacies of the Supreme Court rulings is pervasive uncertainty and debate about the meaning of the takings precedents. Not only are the takings precedents

* Although AB 1600 predated *Dolan* by several years.

often unclear, but they leave many issues unresolved. This means that local governments may sometimes be encouraged by their attorneys to err on the side of caution. As one such attorney observed, “A lot of issues are undecided. So, if you litigate it’s uncertain. Frequently you have to tell clients that, based on existing law, they’re right, but litigation is likely and there’s no precedent.”⁸

For example, when does a regulation go “too far?” We can be certain that 100% loss of property value is a compensable taking, and that a 10% loss is probably not. But what about an 80% loss? The law is still unclear on this issue. To cite another example, legal arguments continue as to what constitutes the “relevant parcel” in a takings claim. If I am prohibited from developing one of my ten 5-acre parcels, have I suffered a 10% loss on my 50 acres or a 100% loss on that single parcel? Given that takings lawsuits are not uncommon, and insurance for takings liability almost unheard of, local governments may be inclined to settle when the level of uncertainty and the potential costs of defending a lawsuit are high enough.

PART II. THE SURVEY

Introduction to the Survey

How have the takings cases affected land use planning and regulation at the local level? To investigate this subject, I mailed a questionnaire to the planning director of every city and county in California.* In this part of the report, I will first explain the logic behind the questions and the execution of the survey. Then I will describe the survey results.

As noted in Part I, my purpose was to address the following general questions:

- *Visibility of takings issues*
- *Impact of takings on land use planning and regulation*
- *Impact on how local governments use fees and exactions*
- *Implications of these changes*

I will now describe how the survey addressed each of these in turn.

Visibility of Takings Issues

Under the heading of “visibility,” I include several sorts of related questions. Are planners familiar with the various takings precedents? Is takings a high-profile issue in discussions and debates about land use at the local level? Do the takings rules put pressure on local governments to change decisions, policies or procedures?

Planners’ Awareness of Legal Precedents and Takings Cases

The survey asked planners to indicate their degree of familiarity with several important U.S. Supreme Court takings cases. A high degree of familiarity with these cases would indicate that takings is a high-profile issue among planners and that their actions could be directly influenced by awareness of the legal precedents and principles involved in these cases.

Takings Objections

If the takings rulings are having an impact, we would expect planners to encounter takings-based objections to policies or decisions. For example, a regulated landowner might complain that a proposed re-zoning is a taking, or a city councilmember might argue against an action because it would unconstitutionally “take” private property. Have the takings rulings “emboldened applicants to resist,” as one planner put it? The survey

* The survey deals with many legal issues, and we considered surveying attorneys instead of planners. However, planners deal with land use management full-time. Therefore, they are probably in a better position to judge how takings issues are actually affecting the practice of land use regulation and planning.

asked how often such objections had been encountered. If the takings rulings of the last 10 years or so have had a large impact, it would also be reasonable to expect that takings objections have increased during that time. Accordingly, the survey asked respondents if they have observed such a trend.

Takings Litigation Threats

If takings objections put pressure on local governments, then threatening litigation would ratchet up the pressure an additional notch. Therefore the survey asked a series of questions about the frequency of such threats, and about whether they have seen an increasing trend in such threats.

Why are we interested in the occurrence of threats? After all, most such threats do not get translated into actual lawsuits, and are often viewed by planners and elected officials as mere rhetoric rather than serious legal challenges.

Still, litigation and threats of litigation can be considered an indicator of how much pressure the takings issue is bringing to bear on local governments. Some have speculated that the fear of litigation creates a “chilling effect” that causes planners to back away from regulating land use. “They are hesitant to do things they think they ought to be doing because they are afraid of litigation,” says Rochelle Brown, an attorney who has represented many local governments in California.⁹

Takings Litigation

Litigation is probably the strongest way the takings rulings can exert pressure on local governments. The survey asked respondents to indicate whether their jurisdiction has been sued for an alleged taking. If many lawsuits are occurring, it would indicate that the takings issue poses significant financial risks for local governments. This would create pressure to change decisions or policies, or alter practices in order to avoid being sued.

This pressure is even more acute if the local government cannot afford the costs of defending a lawsuit. As noted earlier, the *First English* decision upped the ante for cities and counties by making monetary damages more likely in takings cases. In addition, we suspected that insurance policies covering takings liability were the exception rather than the norm. For example, Mark Sellers, City Attorney for Thousand Oaks, told me, “We don’t have any insurance for takings claims, so we are very worried about such lawsuits. Developers know that with limited city funds and no insurance, if they put a big number out there, the city council will be encouraged to settle.”¹⁰ In addition to asking respondents whether they had been sued, the survey asked whether they had insurance coverage for takings liability.

Impact of Takings Issues

Has takings really made a difference? How often is it changing the way local governments manage land use, and in what ways?

According to one planner I interviewed, “In most small towns, anyone who screams ‘litigation’ and brings in high-powered lawyers can make the town roll over.” A number of land use attorneys I interviewed believe that a chilling effect does sometimes occur. Rochelle Brown, an attorney with Richards Watson & Gershon in Los Angeles who has represented many local governments, says that the fear of takings litigation is having an “inappropriate inhibiting effect” on local governments.¹¹

The survey addressed the impact of takings in several different ways. These can be divided into two categories:

- 1) Have concerns about the takings rulings and the possibility of takings litigation led to changed regulatory outcomes? Are specific policies and decisions being changed? Are cities and counties backing off from certain types of fees and exactions?
- 2) Have the takings rulings led cities and counties to *adapt* with new administrative practices or procedures that reduce the risk of takings disputes?

For the exact wording of the survey questions, see Appendix I.

Changed Regulatory Outcomes

The survey posed this question directly: have the Supreme Court takings rulings led local governments to make decisions or enact policies that are different from what they would have otherwise done? For example, have takings objections led a city to make a zoning ordinance less restrictive? Has a county’s general plan been influenced by the desire to avoid takings disputes? The survey posed a similar question about fees and exactions: have takings issues caused local governments to reduce their use of certain kinds of fees or exactions?

Adaptations: Changed Administrative Practices or Procedures

Some changes brought about by the takings rulings can be thought of as administrative or procedural adaptations rather than changed regulatory outcomes. These are changes that do not necessarily alter the outcome of the regulatory process, or the extent or severity of regulations. But they do involve procedural changes designed to reduce the risk of takings conflicts arising and the risk of losing in court should the government agency be challenged.

The survey asked whether cities and counties have adapted by changing their approach to preparing *findings*. Findings are the written administrative record by which governments justify their actions with reference to specific policies, laws, community goals, and factual evidence.

The California Supreme Court has succinctly described the role of findings: “The agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. . . . Among other functions, a findings requirement serves to induce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision.”¹²

Findings are thus key to mounting a successful defense of a takings action. Careful attention to findings also helps ensure that actions will be carried out in a deliberate manner that explicitly takes into account relevant policies, laws, and constitutional protections. A heightened focus on findings can call attention not only to problems with a given decision but also to gaps in local ordinances or the general plan.

The survey also asked about other kinds of adaptations. Development agreements provide a versatile tool for local governments and developers to resolve or avoid disputes. Since 1979, state law¹³ has permitted a city and a developer to enter an agreement granting vested development rights, which in effect locks in current zoning and other regulations that could affect the developer's ability to complete a project.*

"The city gives up its right to change its mind over several decades," notes Michael Dean, an attorney for Kronick Moskovitz Tiedemann & Girard in Sacramento.¹⁴ Since development projects can take years to complete and large investments of capital, such certainty can be very valuable to the developer. At the same time, the agreement allows the city to negotiate with the developer for improvements or contributions that go beyond what *Nollan* and *Dolan* would allow.¹⁵ The added certainty benefits the developer, but can also help foster better planning: "It makes more sense than doing things piecemeal," says Dean.¹⁶

The survey also asked whether cities and counties were changing their policies and guidelines regarding levels of fees and exactions they would seek from developers. They were asked whether they had prepared special studies to justify the levels of fees or exactions for specific projects, and whether they had hired private consultants to conduct such studies.

All of these changes would indicate that public agencies are becoming more deliberate and methodical in their planning and regulation in order to avoid takings disputes. These changes would also indicate that cities and counties are expending more time and resources in carrying out land use planning and regulation.

Implications of the Takings Issue: What do Planners Think?

The survey also asked planners about the implications of the takings issue. Commentators often make assumptions about how public officials view takings. For example, an article in the *Wall Street Journal* stated, "the takings movement is being watched with growing concern by numerous state and local governments, which fear a huge hit on the public treasury – or a sharp decline in their ability to enforce what they consider reasonable environmental, planning and other regulations." On the opposite end of the spectrum are those such as the Pacific Legal Foundation expert who declared, "It's obvious that bureaucracies from the federal level down to the local school board have come to believe that the Fifth Amendment just doesn't apply to them."¹⁷

* The validity of development agreements have been challenged as an invalid "contracting away" of the local government's police power, but appellate courts have not upheld such claims to date. See Curtin, *California Land Use and Planning Law*, p. 148.

Both points of view imply that local planners would not be happy with the constraints imposed upon them by the U.S. Supreme Court's takings rulings – either because these rulings force them to abide reluctantly with the Fifth Amendment or because they force them to back off from reasonable regulations. The survey asked planners if they thought the principles established by the *Nollan* and *Dolan* precedents are consistent with good land use planning. It also asked if they thought the legal climate surrounding takings made it harder to manage land use for the public interest.

Results of the Survey

In April 1999, the California Research Bureau (CRB) mailed the questionnaire to planning directors in all of California's 472 cities and 58 counties (see Appendix I for a copy of the questionnaire).

The survey asked respondents to identify themselves and their city or county, but promised confidentiality. A second copy of the questionnaire was mailed three weeks later to all respondents who had not yet replied. Afterward I conducted telephone interviews with many of the respondents. While the questionnaire was sent to planning directors, in many cases another senior member of the planning staff actually completed the form.

Responses were received from 37 out of 58 counties (63.8%) and 274 out of 472 cities (58.1%). While this is a sizeable percentage of the population, it is not a random sample (the sample only includes those who chose to respond). Therefore, it is possible that the results could be biased, if in fact the characteristics of the respondents are not representative of the population as a whole. For further analysis of the response rates and possible sources of bias, see Appendix IV.

In the following discussion, all of the survey questions are covered, although not necessarily in the order the questions were asked on the survey form. For the exact wording of the survey questions, see Appendix I.

Planners' Awareness of Legal Precedents and Takings Cases

The survey began by asking respondents to rate their familiarity with several of the most important Supreme Court cases of the last decade or so. The results indicate a high level of familiarity with what are arguably the three most important of these cases, *First English*, *Nollan* and *Dolan*, with 90-100% of respondents rating themselves at least "somewhat familiar" with them. However, fewer were familiar with *Lucas*, *Suitum*, and *Del Monte Dunes*. This may be partly explained by the fact that the last two are recent cases with particularly ambiguous outcomes.

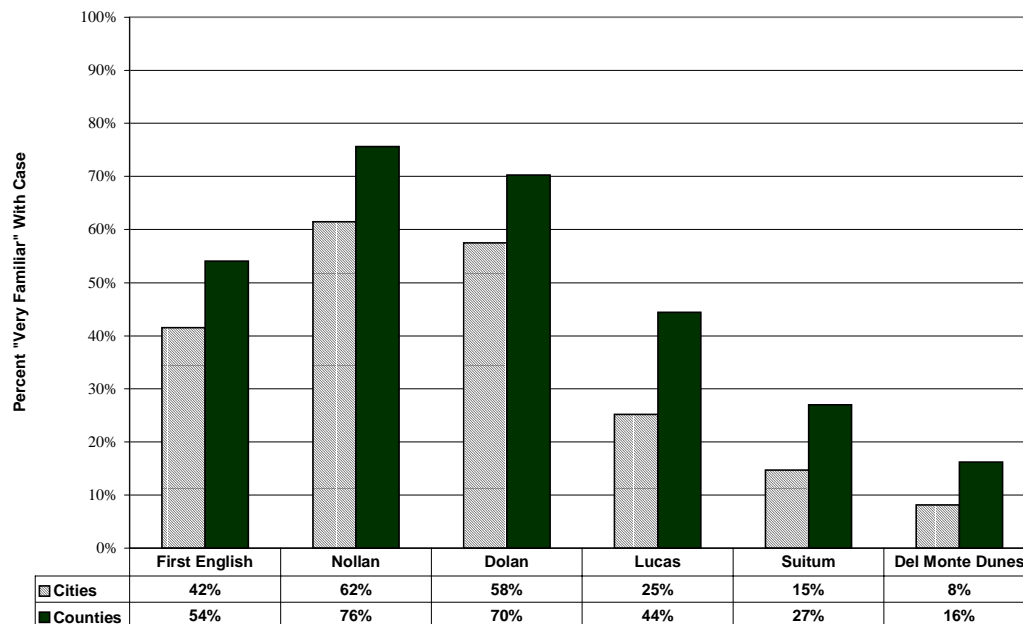
Table 1: Familiarity With U.S. Supreme Court Cases

*How familiar are you with the following U.S. Supreme Court cases and their legal implications?**

Case	Familiarity With U.S. Supreme Court Cases					
	CITIES (n=273)			COUNTIES (n=37)		
	Not	Somewhat	Very	Not	Somewhat	Very
First English	10%	49%	42%	0%	46%	54%
Nollan	4%	35%	62%	0%	24%	76%
Dolan	8%	35%	58%	0%	30%	70%
Lucas	36%	39%	25%	17%	39%	44%
Suitum	48%	38%	15%	38%	35%	27%
Del Monte Dunes	54%	38%	8%	35%	49%	16%

Overall, county planners seem to have a higher level of awareness of these cases than their city counterparts, as illustrated in Figure 6 below.

Figure 1: Percent That are "Very Familiar" With Court Cases

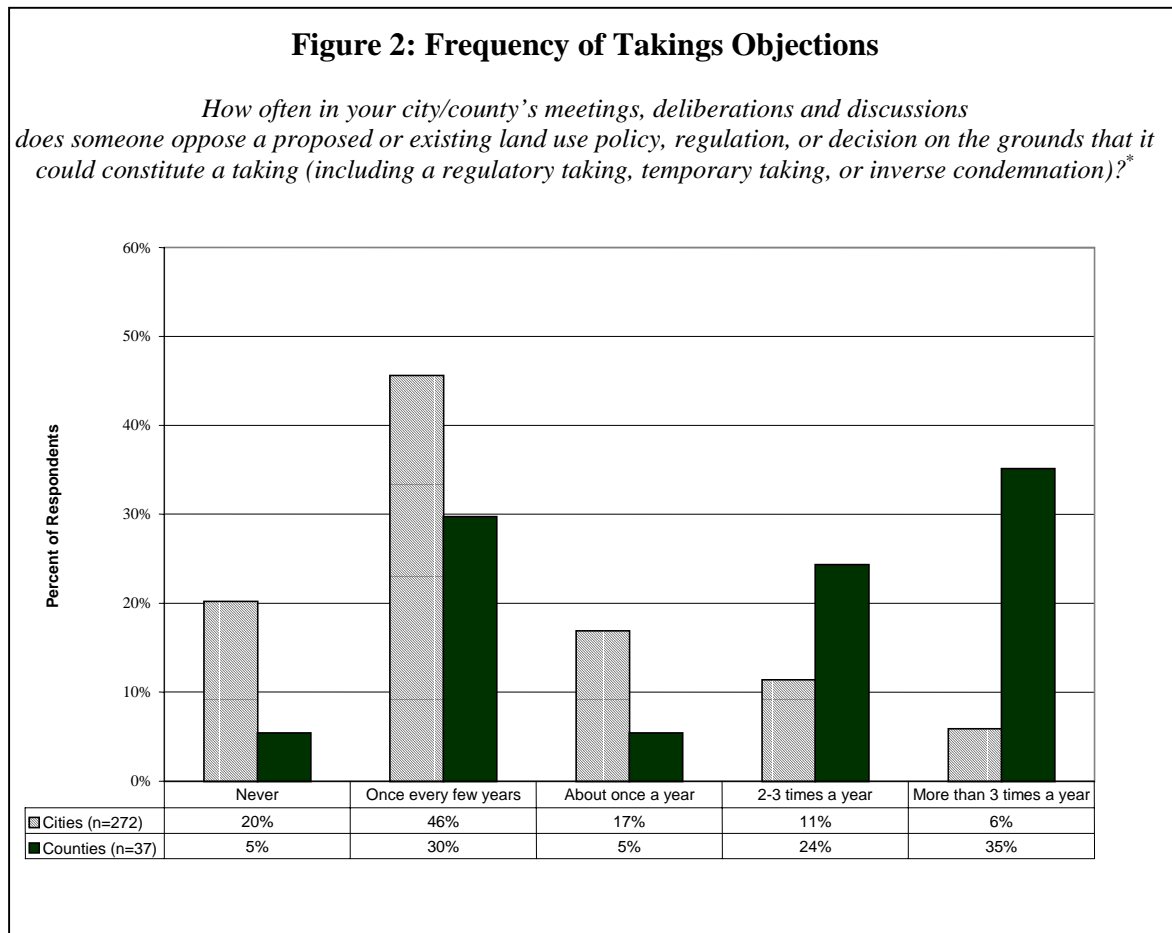


* Survey Question 2 (see Appendix I).

Frequency of Takings Objections

Most of the attention focused to date on takings concerns court cases. However, it seems likely that for every case that makes it to the courts there must be many other instances where takings issues arise. Such instances might include public meetings of city councils, boards of supervisors, and planning commissions; or in less public settings such as negotiations or discussions between officials and property owners or citizens. One goal of the questionnaire was to gauge the degree to which takings objections are being raised, exerting pressure on local governments. As can be seen from Figure 2, such objections arise at least once a year for a substantial portion of respondents (34% of city respondents and 64% of the counties). However, the majority of cities (66%) reported experiencing such objections less than once per year.

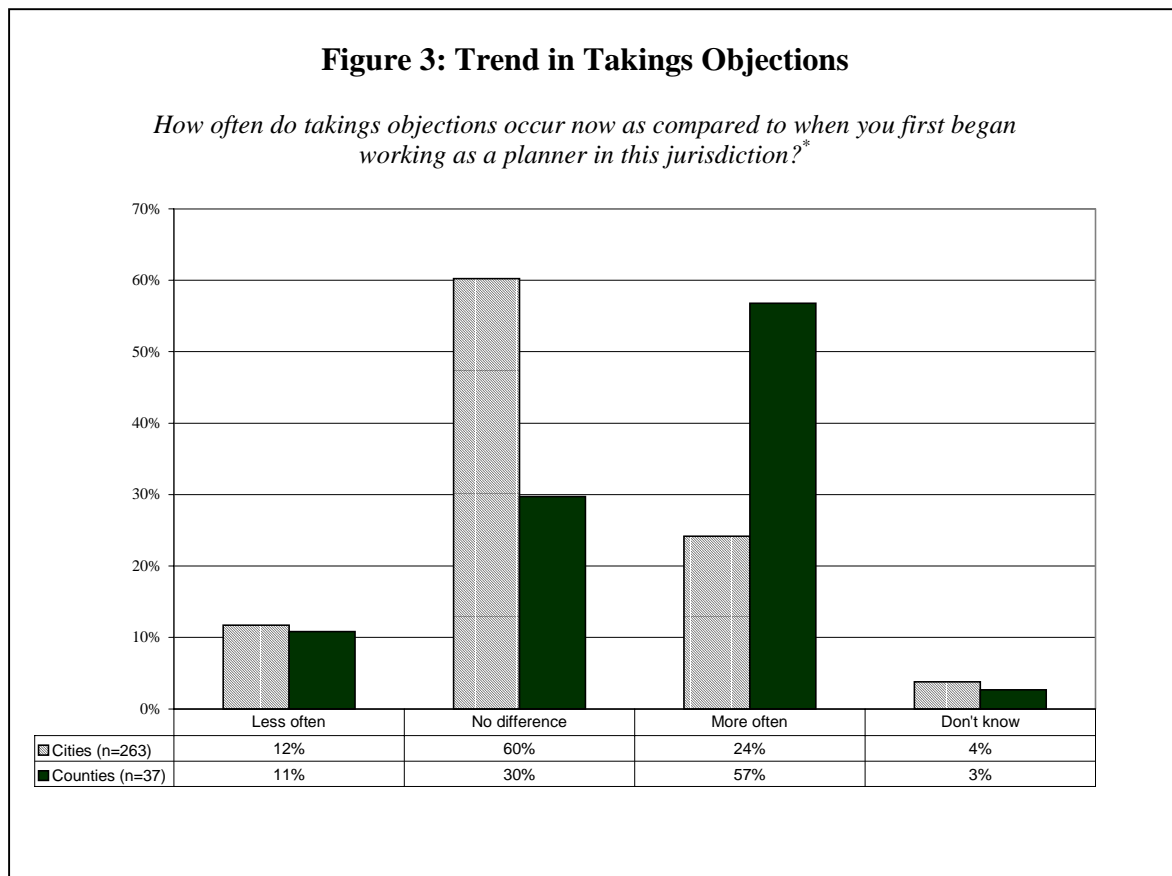
The difference between the cities and counties is striking. As will be seen, this is a recurring theme in the data – counties are more likely than cities to report takings-related issues and disputes.



* Survey Question 3(a). See Appendix I.

Trend in Takings Objections Over Time

Given the nature of the Supreme Court rulings on takings in the last 10-15 years, we might expect to see an upward trend in the frequency of takings objections at the local level. The survey sought to find out if planners see an overall trend in takings objections as either increasing or decreasing over the last several years.

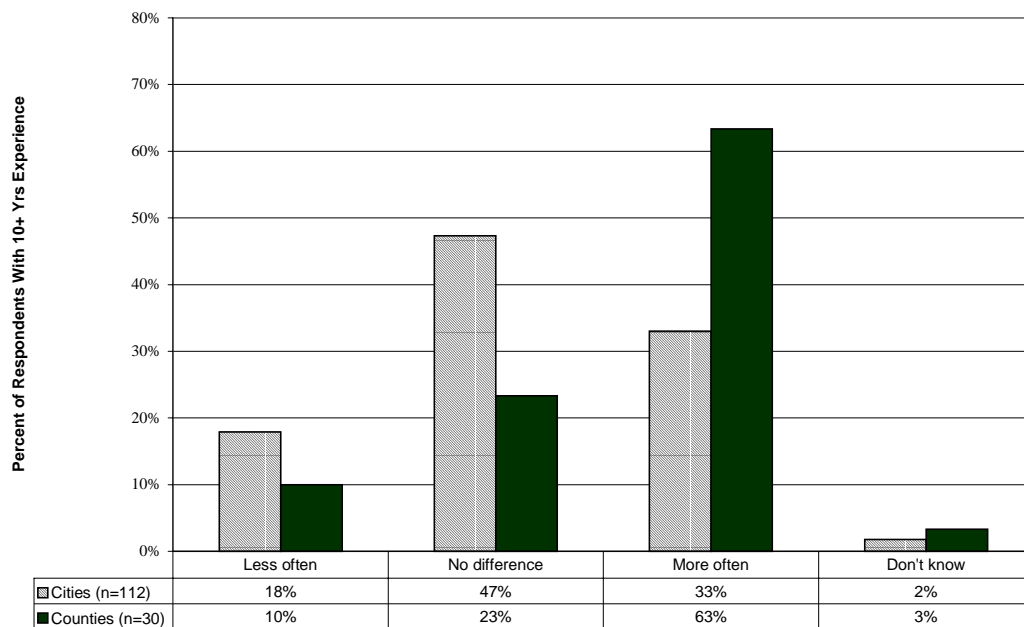


The difference between cities and counties is again striking: most cities (72%) say there is no trend or a decreasing trend and most counties (57%) report an increasing trend.

The answer to this question is relative to the respondent's years of experience. Nearly all the county respondents had more than ten years of experience (30 out of 37). So it is useful to see how the trend looks to city and county planners who have ten or more years of experience.

* Survey Question 3(b). See Appendix I.

**Figure 4: Trend in Takings Objections
(Respondents With 10 Years or More Experience)**



The pattern is similar: the majority of county planners with ten or more years of experience said there is an increasing trend (63%). The majority of city planners with similar experience thought there was no trend or else a decreasing trend (65%).

Stages When Takings Objections Occur

These questions concerned the subject-matter of takings objections. Respondents were asked to indicate “at what stage(s) of planning, regulation, or other decision-making” the takings objections have occurred in. They were offered several choices and could indicate as many as were applicable.

Table 2: Stages at Which Takings Objections Occurred

*Please indicate in what stage(s) of planning, regulation, or other decision-making the takings objections occurred.**

Stage of Planning Process	PERCENT OF RESPONDENTS REPORTING TAKINGS OBJECTIONS*	
	Cities (n=211)	Counties (n=36)
Changes in General or Specific Plan	50%	81%
Zoning Changes	59%	75%
Subdivision Approval	43%	64%
Building Permits	6%	3%
Conditional Use Permits/Variances	50%	67%
Rent Control Ordinance or Regulations	4%	0%
Other	18%	3%
*Note: there were 211 cities and 36 counties responding to this question. Each respondent could report multiple answers. Thus, the columns do not add up to 100%.		

It seems that takings objections are likely to arise at almost any of these stages. The lowest rates were for building permits and rent control.[†] Building permits involve little if any discretionary power on the part of the regulators, so this result is perhaps not surprising.

Among the city respondents, eight wrote in that takings objections had occurred during the design review process. Given that design review was not among the choices offered on the survey form, this seems significant.

Takings objections were reported as being more frequent in counties than in cities, and more counties reported takings objections in multiple stages of the planning process. Overall, it seems that county planners encounter more contention and controversy about takings than do their city counterparts.

Objections to Fees and Exactions

Are fees and other sorts of exactions giving rise to many takings objections? Exactions have been an important focus of the Supreme Court's takings jurisprudence, and the *Nollan* and *Dolan* decisions are perhaps the most widely discussed takings decisions of recent years. In light of these facts, it is perhaps not surprising that a substantial number of respondents have encountered such objections (35% of cities and 58% of counties).[‡] Again, counties report more takings controversy than cities.

* Survey Question 3(c). See Appendix I.

[†] It should be noted, however, that as of 1992, only 73 cities in the entire state had rent control ordinances. Office of Planning and Research, "The California Planners' 1992 Book of Lists," March 1992, p. 48.

[‡] Survey Question 3(d). See Appendix I.

Those who encountered such objections were asked to choose from a list indicating the types of exactions that had been objected to. They were free to indicate as many items on the list as was applicable.

Table 3: Types of Exactions Objected To (Cities Only)

*Please indicate what sorts of fees or exactions have been the subject of takings-related opposition.**

Type of Exaction	Percent Reporting Objections*	
	Fees	Easements/Property Dedication
Open Space or Parks	44%	35%
Public Trails	5%	35%
Access to Coast or Other Scenic or Recreational Resource	0%	9%
Public Transit System	4%	10%
Building or Modifying Roads, Interchanges, or Overpasses	28%	50%
Bicycle Paths	4%	15%
Low- or Moderate-income Housing	19%	6%
Schools	28%	5%
Water or Sewerage Infrastructure	26%	10%
Police or Fire Protection	13%	4%
Flood Control or Other Public Safety	9%	18%
Mitigation of Wildlife, Endangered Species, or Wetlands Impacts	14%	31%
*Note: there were 78 respondents to this question. Each could report multiple answers. Thus, the columns do not add up to 100%.		

Among the various categories of exactions, those intended to help build or modify roads seem to be a very common source of takings objections in both cities and counties. Exactions for open space, wildlife, parks, schools, and public trails also give rise to a large share of the exactions-related takings objections. School fees are also a common source of takings objections.

* Survey Question 3(e). See Appendix I.

The pattern among county respondents is similar:

Table 4: Types of Exactions Objected To (Counties Only)

Type of Exaction	Percent Reporting Objections*	
	Fees	Easements/Property Dedication
Open Space or Parks	19%	33%
Public Trails	0%	38%
Access to Coast or Other Scenic or Recreational Resource	0%	24%
Public Transit System	0%	0%
Building or Modifying Roads, Interchanges, or Overpasses	38%	48%
Bicycle Paths	5%	10%
Low- or Moderate-income Housing	10%	0%
Schools	57%	0%
Water or Sewerage Infrastructure	24%	5%
Police or Fire Protection	24%	0%
Flood Control or Other Public Safety	10%	10%
Mitigation of Wildlife, Endangered Species, or Wetlands Impacts	43%	43%
*Note: there were 21 respondents to this question. Each could report multiple answers. Thus, the columns do not add up to 100%.		

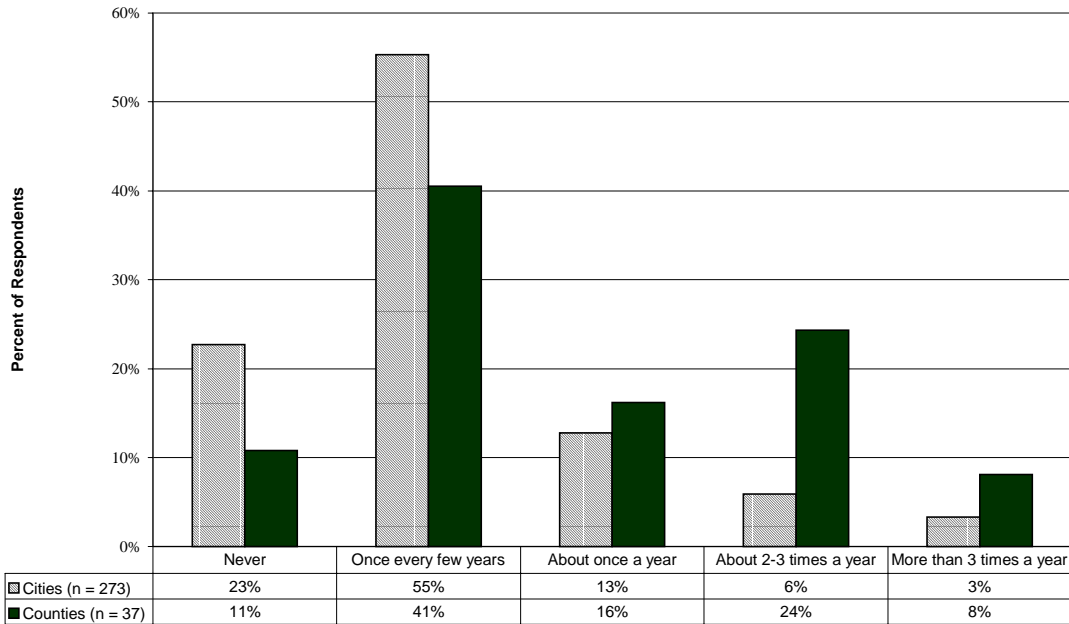
In general, it is difficult to conclude from the survey data whether these numbers show that certain types of exactions are inherently controversial, or whether they merely reflect the relative frequencies with which certain types of exactions occur.

Takings Litigation Threats and Lawsuits

In order for the takings rulings to have a “chilling effect,” planners or elected officials would have to be apprehensive about being sued. While we can gauge the likelihood of litigation by looking at the frequency of takings lawsuits, a chilling effect could be produced by the mere threat of a lawsuit. Again, counties seem to face more takings-related controversy than cities. Among the cities, 22% reported takings litigation threats occurring once a year or more, while among the counties 48% reported such threats as occurring once a year or more. Most respondents indicate their city or county has been threatened with takings litigation at some time.

Figure 5: Frequency of Takings Litigation Threats

*How often does it occur that your city/county is threatened with litigation (orally or in writing) by a property or business owner for an alleged regulatory taking, temporary taking, or inverse condemnation?**

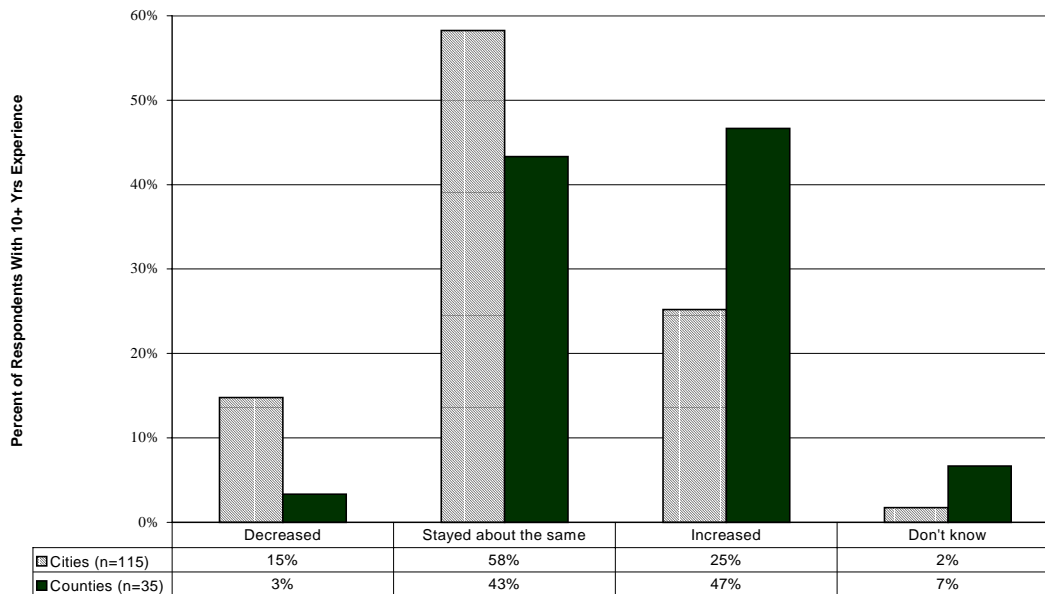


Has the frequency of such threats been increasing or decreasing in recent years? Counties are more likely than cities to report an increasing trend in takings litigation threats. A minority of cities in the sample (25%) report that litigation threats have increased over the last ten or more years, while a considerably larger number of the counties (47%) see an increasing trend. Recall that counties were also more likely than cities to see an increase over time in takings objections (Figures 3 and 4).

* Survey Question 5(a). See Appendix I.

**Figure 6: Trend in Frequency of Takings Litigation Threats
(Respondents With 10 or More Years Experience)**

*Do you think the frequency of takings litigation threats has increased, decreased, or stayed about the same since the first time you started working as a planner in this jurisdiction?**



How often does the threat of a lawsuit become a reality? The survey asked respondents whether their jurisdiction had been sued for an “alleged regulatory taking, temporary taking, or inverse condemnation.”[†] Quite a few cities (33%) and counties (46%) reported having been sued.[‡]

To get a better idea of how accurate these numbers really were, I personally contacted 14 of the respondents who answered “yes” to this question. Of these, three seem to have misinterpreted the question (one was referring to an eminent domain lawsuit, another to a lawsuit that was only threatened, and a third said the answer was an error). On the other hand, it should also be remembered that these numbers represent only those lawsuits that the respondents were aware of, and many of them have had only a few years or less of experience in their current jurisdiction.

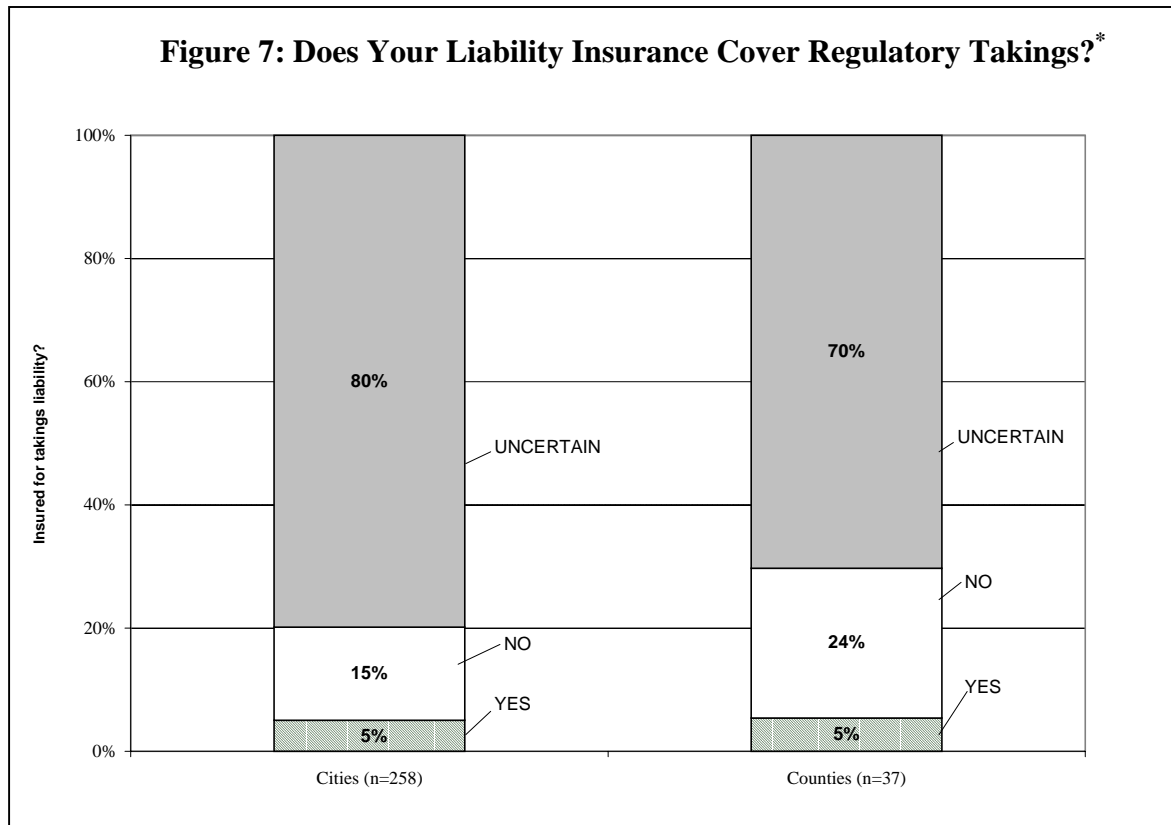
* Survey Question 5(b). See Appendix I.

† Survey Question 6. See Appendix I.

‡ In interpreting these numbers, one should bear in mind, as some respondents noted in their comments or follow-up interviews, that many of these lawsuits are not *exclusively* takings claims – they may include takings as one among several causes of action.

Insurance and Exposure to Takings Liability Risk

Based on statements by several officials that it is not possible to obtain insurance that will cover takings, I included a question that asked whether the respondent's city or county had such insurance coverage.



The great majority of city and county planners apparently either do not have insurance or are uncertain as to whether they do or not.

Changed Regulatory Outcomes

The survey found evidence that takings issues have led to changed regulatory outcomes in some cities and counties. Question 4(a) on the survey asked respondents, “In your opinion, are there any types of fees or exactions that your county has become less likely to seek from developers as a result of the precedents set in the U.S. Supreme Court’s *Nollan* and *Dolan* decisions? (as codified in AB 1600 and Government Code §66000 *et seq.*)?”† Among cities, 19% of respondents answered “yes,” while the figure was 35% for counties.

What specific types of fees and exactions are cities and counties less likely to use? Respondents who answered “yes” to the previous question were given an opportunity to

* Survey Question 7. See Appendix I.

† Survey Question 4(a). See Appendix I.

elaborate with an open-ended response. Many respondents chose to leave this section of the survey blank, which is perhaps an indication of how politically and legally sensitive this subject can be. Below is a table that groups the responses received into categories:

Table 5: Types of Fees/Exactions Used Less

*If you answered “yes”[to the previous question about reducing the use of some types of fees and exactions], please indicate below what sorts of fees or exactions have been affected.**

Type of Fee or Exaction	Types of Fees or Exactions That Are Used Less*	
	Cities (n=50)	Counties (n=12)
Road/Traffic/Street	32%	25%
Sewer/Water/Drainage	8%	0%
Habitat/Open Space/Park	14%	17%
Trail/Public Access	16%	42%
Police/Fire	6%	0%
Housing	2%	0%
School Fees	0%	8%
Other/Not Specified	42%	33%
<p>*Note: there were 50 cities and 12 counties responding to this question. Each respondent could provide multiple answers, so columns don't total 100%.</p>		

These numbers suggest that in terms of fees and dedications, the impact of *Nollan* and *Dolan* is greatest in the areas of transportation (roads and streets), habitat/open space/parks, and trails/public access exactions. For example, among cities that reported reducing their use of some types of fees or exactions, 32% of them say that this change affected their use of fees or exactions for road, traffic, or street improvements.

A large number of responses are categorized as “other/not specified.” This question was an open-response question and the above numbers represent my attempt to aggregate the various answers into categories. Many of the responses were not readily categorized. For a richer sense of the character and diversity of these responses, the reader should see Appendix II, in which all of the responses to this question are reproduced in full.

Survey Question 10(a) also addressed changes in regulatory outcomes, but in a more general way. It asked if respondents could “think of any specific examples” in which takings concerns had “caused your city/county to make a land use decision or policy that was different from what you believe the city/county would have done in similar

* Survey Question 4(b). See Appendix I.

circumstances prior to these Supreme Court precedents?”* Seventeen percent of cities and 33% of counties answered “yes.”

Do such changes occur most often at any particular stage of the planning process? Respondents who answered “yes” were given a list of stages in the planning process, and asked to indicate at which ones the changes occurred.

Table 6: When Did Changes in Policies or Decisions Occur?†

<u>Stage at Which Change Occurred</u>	Percent Reporting Changed Decision or Policy*	
	<u>Cities (n=45)</u>	<u>Counties (n=14)</u>
General or Specific Plan	38%	50%
Zoning Changes	31%	36%
Subdivision Map Approval	36%	43%
Building Permits	2%	0%
Conditional Use Permit/Variance	40%	36%
Rent Control Ordinance/Regulations	7%	0%
Other	20%	7%
*Note: 45 cities and 14 counties responded to this question. Each could provide multiple answers, so so the columns do not total 100%.		

Significant numbers of the reported changes are occurring at several stages of the planning process. For example, among the cities reporting changed decisions or policies, 38% say that the change affected the general plan or specific plan process. Thirty-one percent report that such changes have involved zoning ordinances. Similar numbers are reported for subdivision map approval and conditional use permits and variances. Changes at the building permit stage are rare, as are changes to rent control laws.

The survey allowed respondents to provide written elaboration explaining the type of decision or policy affected. These written remarks are very diverse and cannot readily be summarized as numbers in a table. The full written responses are provided in Appendix III. A perusal of these comments reveals some recurring themes. Counties tend to report changed policies or decisions having to do with broad land use designations in zoning or general plans, as well as issues of open space and public access to recreation. Cities are

* Survey Question 10(a). See Appendix I.

† Survey Question 10(b). See Appendix I.

dealing with similar issues, but are more preoccupied than counties with issues related to financing infrastructure such as roads.

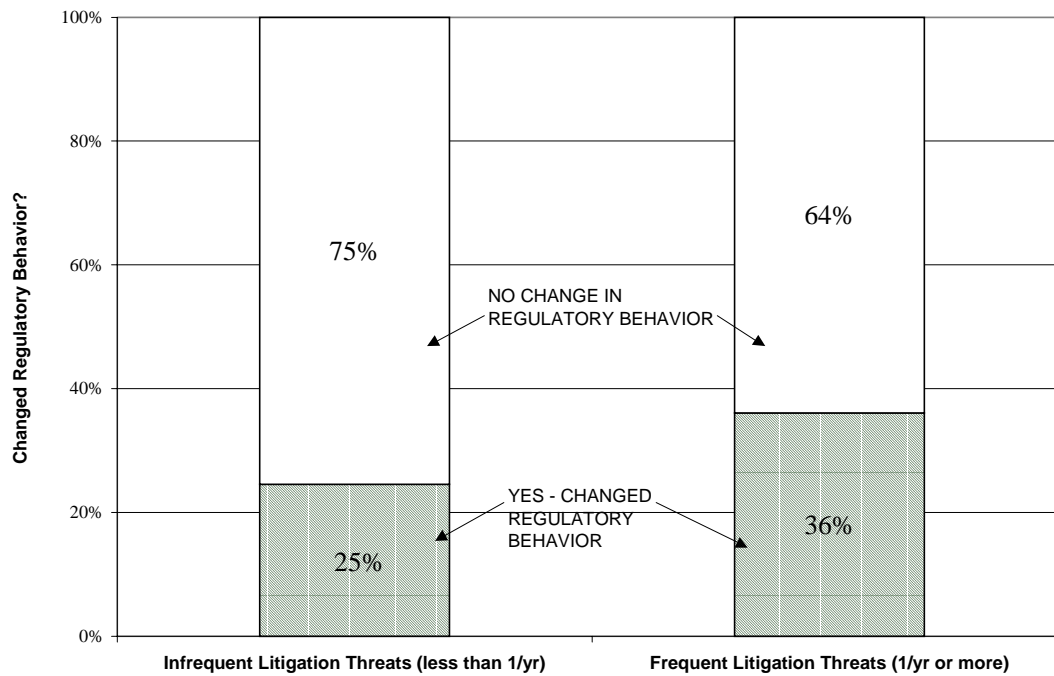
How Frequent are Changed Regulatory Outcomes?

We have discussed two separate questions, Question 4 and Question 10, that each asked about changed regulatory outcomes. Question 4 asked if respondents had reduced their use of any types of fees or exactions. Question 10 asked if any decisions or policies had been made differently because of the takings precedents. I defined the pool of respondents who answered “yes” to at least one of these two questions as constituting a set of respondents who have *changed their regulatory behavior* due to the takings rulings or related concerns. Twenty-seven percent of the cities and 49% of counties report changed regulatory behavior – they answered “yes” to at least one of these two questions.

It would be natural to expect that everyone who answered “yes” to Question 4(a) should also answer “yes” to Question 10(a) – one implies the other. But clearly some respondents didn’t see it that way. This might be due to the fact that Question 10(a) asked them if they could think of a specific example. Some who answered “yes” to Question 4(a) may have been unable to think of a specific example but nevertheless believed that there had been some avoidance of certain types of fees or exactions.

There are a number of reasons that a city or county might change its regulatory behavior. One might be a simple desire to comply with the law as it is understood by the decision-makers. Another would be to prevent takings lawsuits. We would expect that cities or counties that have faced frequent takings objections, or that have been sued or threatened with takings lawsuits, would be more likely to have changed their regulatory behavior. Figure 8 below suggests that this may be the case.

Figure 8: Changed Regulatory Behavior – Relationship to Takings Litigation Threats (Cities Only)

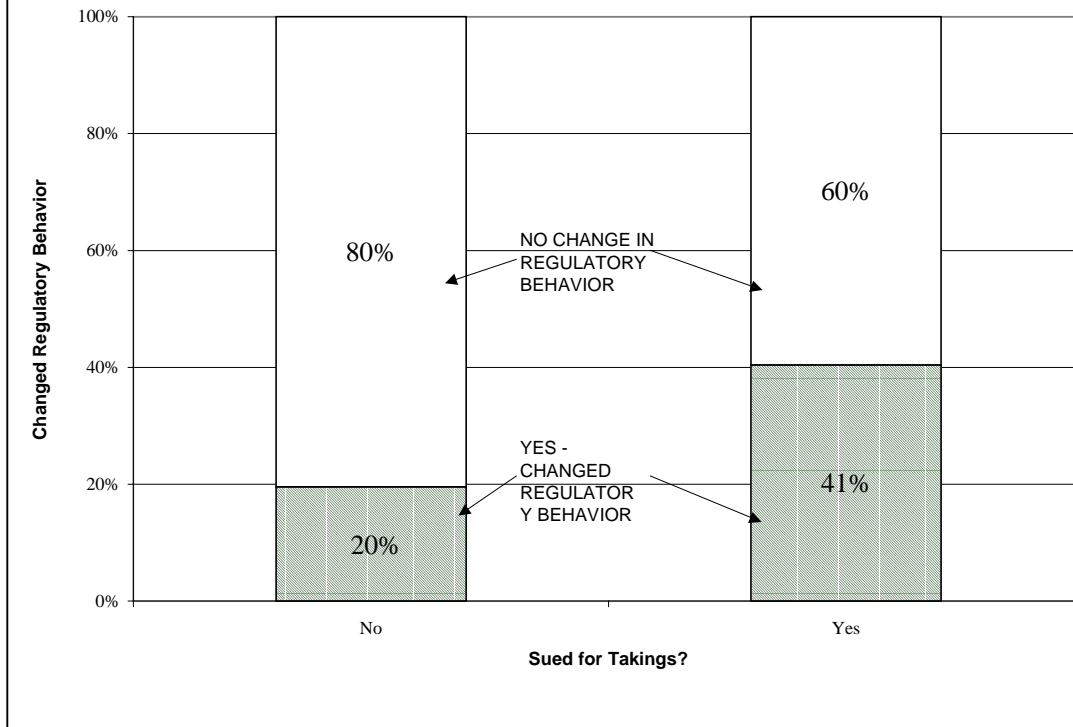


It appears that there may be a relationship between the occurrence of takings litigation threats and changed regulatory behavior (although we cannot necessarily infer cause and effect). Among cities that have been subject to frequent litigation threats, 36% report having changed their regulatory behavior. In comparison, only 25% of the cities with less-frequent litigation threats reported changed regulatory behavior. However, this difference is not large enough to be considered statistically significant.*

The connection is stronger when we consider the relationship between takings lawsuits and changed regulatory behavior. As shown in Figure 9 below, among cities that have been sued for takings, 41% report having changed their regulatory behavior, in comparison to only 20% of those who have not been sued.

* A standard test of statistical significance for such comparisons is the Chi-Square test. The Chi-Square value indicates the probability (or “confidence level”) that the observed difference is *not* due to random chance. The Chi-Square value for this comparison indicates that we can only be 85% confident that the pattern in Figure 8 is not due to random variation (Chi-Square=2.05 with 1 degree of freedom). A confidence level of at least 90% is often considered the threshold for concluding that a pattern is statistically significant. By this standard, the difference in Figure 8 is not statistically significant.

Figure 9: Changed Regulatory Behavior – Relationship to Takings Lawsuits (Cities Only)

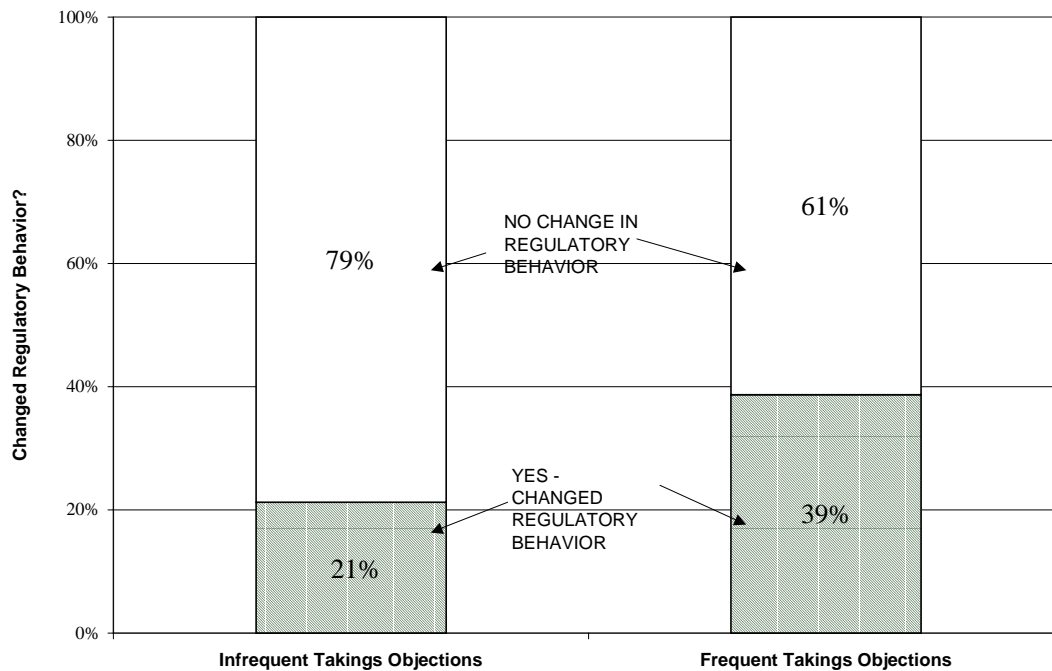


This difference is statistically significant.*

A similar pattern can be seen for takings objections: cities that are subject to frequent takings objections are more likely to report changed regulatory behavior:

* According to the Chi-Square test, the relationship between takings lawsuits and changed regulatory behavior is statistically significant at the 90% confidence level. Chi-Square=7.7 (1 degree of freedom), indicating that to a 94% confidence level the distribution is non-random.

Figure 10: Changed Regulatory Behavior – Relationship to Takings Objections (Cities Only)

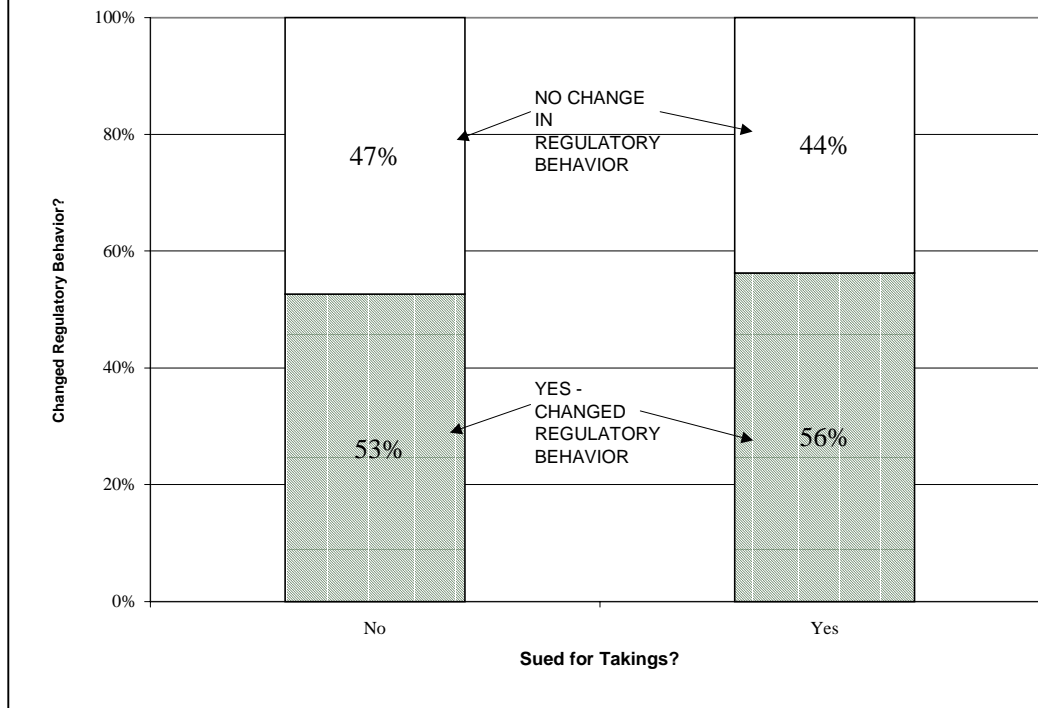


Cities with frequent takings objections are more likely (39%) to report changed regulatory behavior than are cities with infrequent takings objections (21%). This pattern is statistically significant.*

The county data is more ambiguous on this topic. Consider, for example, the relationship between takings lawsuits and changed regulatory behavior at the county level.

* Chi-Square=11.3 (1 degree of freedom), indicating to a 99% confidence level that the distribution is non-random.

Figure 11: Changed Regulatory Behavior – Relationship to Takings Lawsuits (Counties Only)



Among counties that have been sued, a higher percentage reported changed their regulatory behavior (56%, as compared to 53% of those that did not report having been sued). However, the observed difference is not statistically significant.* This proved to be the case as well for takings objections and takings lawsuits – neither seemed to have a statistically significant relationship to changed regulatory behavior. This aspect of the results is difficult to explain, especially since the city results did show the expected pattern of changed regulatory behavior being correlated to takings objections, litigation threats and lawsuits.

Development Agreements

In addition to changing the substance of regulations or regulatory decisions, the survey results provide evidence as to how local planners are adapting to the challenge of takings by changing procedures or adopting new ones.

Development agreements provide a versatile tool for local governments and developers to resolve or avoid disputes. Since 1979, state law¹⁸ has permitted a city and a developer to enter an agreement granting vested development rights, which in effect locks in current zoning and other regulations that could affect the developer's ability to complete a

* Chi-Square=0.46, 1 degree of freedom (the pattern is 83% likely to be due to random variation).

project.* The survey asked respondents whether, during their tenure in their current city or county, “a desire to avoid takings litigation has prompted your city/county to use development agreements more often.”† A total of 25% of cities and 16% of counties report having made greater use of development agreements as a way of avoiding takings conflicts. The great majority of jurisdictions evidently have not done so.

As with some of the earlier questions, this one is relative to the respondents’ years of experience in his or her jurisdiction. When we compare respondents with ten or more years of experience in their jurisdiction, the difference between cities and counties mostly disappears: 19% of cities and 17% of counties report making greater use of development agreements.

Findings

Findings are another area in which cities and counties can adapt. Findings are the written administrative record by which governments justify their actions with reference to specific policies, laws, community goals, and factual evidence. The survey shows that a heightened attention to findings is one of the most pervasive impacts of the takings rulings.

The survey asked, “During the last ten years, has concern about the takings issue prompted your city/county to adopt new standards for creating written findings or an administrative record of land use decisions?”‡ The majority of respondents (55% of cities and 89% of counties) report that concern about takings has changed the way their jurisdiction prepares findings. A similar pattern is in evidence when we compare only among respondents with ten or more years of experience. Among these more veteran city planners, 60% report this adaptation, while among counties the rate is 93%.

Fee and Exaction Studies and Standards

The takings rulings also appear to have made local governments re-evaluate their procedures and policies for setting the levels of fees and exactions. Respondents were asked whether “concern about the takings issue led your city/county to adopt new standards, guidelines, or policies for the levels of fees or exactions the county will seek from developers during the last ten years.”§ Forty-five percent of cities and 42% of counties answered “yes.”

Planning agencies often conduct or contract for a formal technical study when they revise or introduce new development fee ordinances. In the post-Nollan/Dolan environment, such a study will typically contain a “nexus” section to comply with the nexus/rough proportionality standards embodied in California statute.¹⁹ In one of the case studies presented later, I will detail one example, the Santa Rosa Capital Facilities fee.

* The validity of development agreements have been challenged as an invalid “contracting away” of the local government’s police power, but appellate courts have not yet upheld such claims. See Curtin, *California Land Use and Planning Law*, p. 148.

† Survey Question 8. See Appendix I.

‡ Survey Question 9(a). See Appendix I.

§ Survey Question 9(b). See Appendix I.

If such studies are being carried out for individual projects, it would suggest a particularly cautious and resource-intensive approach to the takings issue. The survey asked, “In the last ten years, has your city/county ever conducted a study to ascertain, for a specific development project, the fees or exactions that would be permissible under the standards established by the *Nollan* and *Dolan* decisions (as codified in AB 1600 and Government Code §66000 *et seq.*)?”* About a quarter of cities and counties (27% and 25% respectively) report having done such studies.

Who is doing all of these studies? The survey asked whether the city or county had ever employed private consultants to carry out the fee/exaction studies discussed in the previous two survey questions.† Sixty-three percent of cities and 60% of counties report using consultants.

Implications: What Do Planners Think?

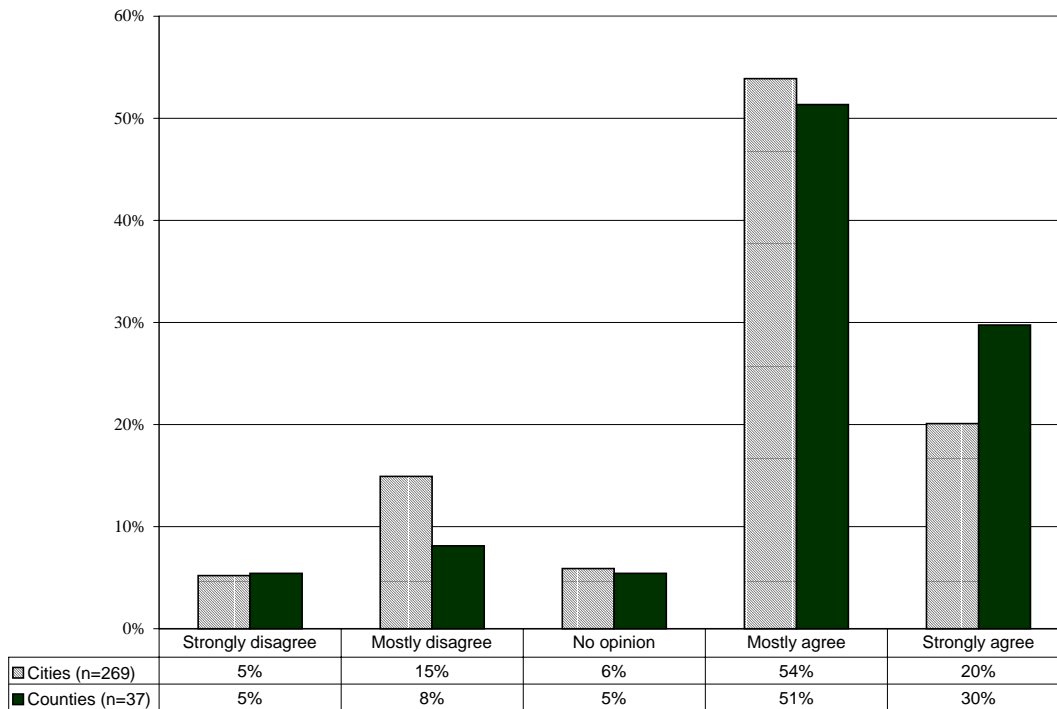
It is clear that takings issues are having some effect on both the style and substance of land use planning in many cities and counties. Are such changes predominantly salutary or harmful? We might expect planners to express dissatisfaction with the current situation, since it imposes constraints on their powers to plan and regulate. However, the survey results indicate that many planners view these rulings in a favorable light.

* Survey Question 9(c). See Appendix I.

† Survey Question 9(d). See Appendix I.

Figure 12: Attitude Toward Nollan/Dolan Precedents as Good Planning Practice

*Please indicate the extent to which you agree or disagree with the following statement: “The nexus and rough proportionality standards established by the Nollan and Dolan decisions, when followed carefully, simply amount to good land use planning practice.”**



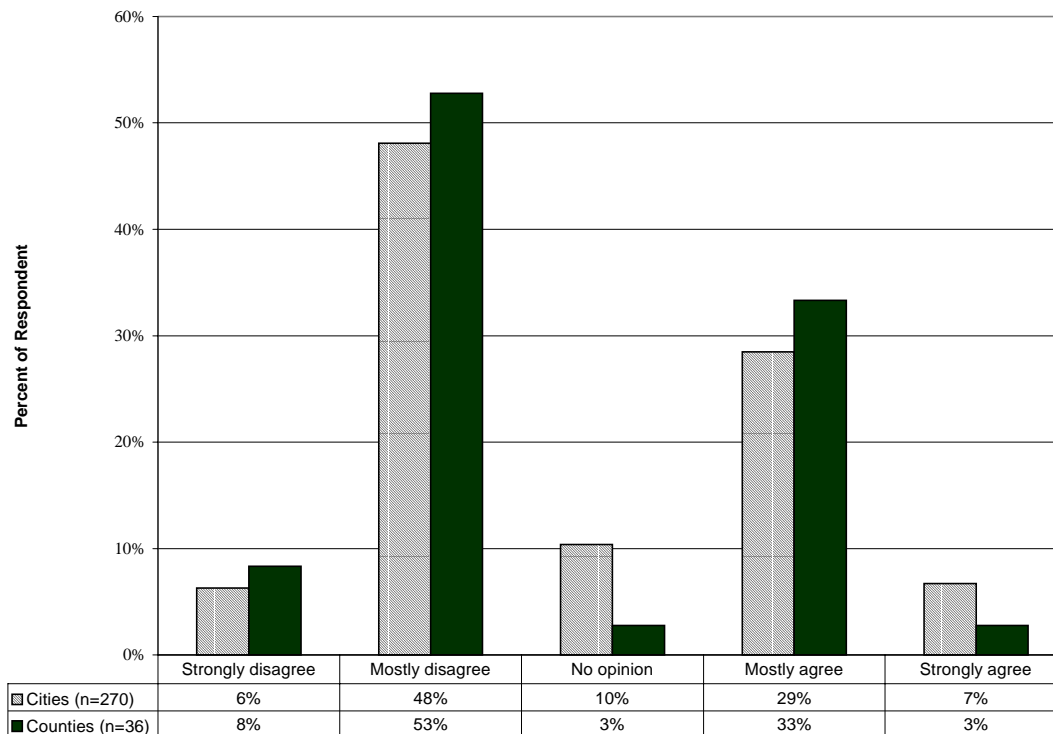
A clear majority of respondents (74% of cities and 81% of counties) either agreed or strongly agreed with the statement that the Nollan and Dolan precedents, when followed carefully, amount to good land use planning practice.

The next question was directed at determining whether planners feel that the legal climate surrounding takings has been detrimental to their efforts to carry out good planning.

* Survey Question 11(a). See Appendix I.

Figure 13: Does Takings Legal Climate Reduce Ability to Serve Community Needs?

Please indicate the extent to which you agree or disagree with the following statement:
*“U.S. Supreme Court decisions on takings have helped to create a legal climate that reduces our city/county’s ability to manage land development to serve the needs of our community.”**



A majority (54% of cities and 61% of counties) mostly or strongly disagree with the statement that the takings legal climate is having a detrimental effect on their ability to carry out good planning. A minority (36% of both cities and counties) agree with the statement. We might term this group the “worried planners.” They tend to think that the takings issue has made it more difficult for them to do their job of serving the public interest.

As seen in Figure 12, there is a minority of “dissenters” who disagreed with the statement that the *Nollan* and *Dolan* principles represent good land use planning. It would be natural to expect that the “dissenters” and the “worried planners” might represent more or less the same group of individuals. In fact, only 23 of the 269 city respondents who answered both questions fit the description of being both “dissenters” and “worried” (9%). Similarly, only 1 of the 36 county respondents fit this description. It was quite possible, for example, for a respondent to see the *Nollan* and *Dolan* precedents as good land use planning practice and still feel the legal climate around the takings issue was harmful. Twelve counties, or one-third, and 70 cities, or 26%, fit that description.

* Survey Question 11(b). See Appendix I.

Readers who are interested in a more in-depth statistical analysis of the survey results should refer to Appendix V, where I explore the effects various community characteristics may have on the survey results. I explore whether the survey responses are correlated with variables such as city or county population size, growth rate, and adoption of growth control measures.

PART III. CASE STUDIES

The survey data gave us a general sense of how frequent it is for cities or counties to change their policies or regulatory decisions in response to the takings rulings. But they offer little detail as to the substance or circumstances of such changes. The takings issues that influence land use planning are the product of laws that are in force statewide. But how takings plays out on the ground is always conditioned by local politics and economics.

The six case studies that follow are meant to fill out this picture. These cases are all fairly typical of situations encountered throughout the state – instances in which takings played a role in decisions on issues such as open space, transportation infrastructure, recreation, or developers fees. These cases were documented through review of public records, site visits, and interviews.

1) City of Murrieta: Takings objections from a developer forced the city to purchase land for a future freeway overpass rather than exact it as a condition of a shopping center development. This case illustrates how the takings rulings constrain some cities in their efforts to provide traffic infrastructure, particularly when the city tries to extract the improvements from a single developer who objects to paying for a need created in part by other developments besides his own.

2) Santa Cruz County: This case illustrates a phenomenon reported by a number of survey respondents – takings objections in the context of exactions for public trails. It also illustrates how the mobilization of political pressure, rather than the threat of litigation, may be the decisive factor in the local government response to takings issues. Often, as in this case, such strong, broad-based opposition arises at the level of general land use policies rather than specific project-level decisions, because such policies affect so many landowners.

3) Whaler's Cove: Because of the *Nollan* precedent, the County of San Mateo and the California Coastal Commission allowed development of a country inn without securing public access to a popular beach. In this case, a determined property owner and her attorney were able to face down a powerful regulatory agency.

4) El Dorado County: The Planning Commission cited property rights concerns as one reason for a set of controversial changes in county land use policies during the general plan update process. This is an example in which takings arguments found a receptive ear among officials sympathetic to property rights arguments. As in the Santa Cruz County case study, the planning discussions became highly controversial and politicized, in large part because general plan discussions have such profound, far-reaching effects on so many property owners.

5) West Sacramento: The city decided not to exact an easement from a service station developer for a regional bike path, despite the fact that the city's bicycle master plan calls

for such exactions. Here a decision was changed simply by a planner's awareness of takings precedent, without any outside pressure to do so.

6) City of Santa Rosa: Concern about potential vulnerability to takings lawsuits leads the city to create a new capital facilities fee program. Santa Rosa illustrates how the takings rulings have made some local governments take a more formal, rationalized approach to planning, particularly in the context of developer fees.

Case Study #1: Freeway Interchange in Murrieta

In 1997, the City of Murrieta found itself paying a San Clemente developer \$1.4 million out of reserves to acquire a few weed-covered acres of land at the corner of a new strip mall. This was a substantial sum for a small city with a fast-growing population and a tightly stretched operating budget of \$11 million. But the land would be needed one day, perhaps in ten years, to add a loop onramp to the adjacent I-15 freeway interchange. The developer of the California Oaks Plaza shopping center had persuaded Caltrans and the city's own attorney that requiring him to dedicate or reserve the right-of-way could be a regulatory taking. Caltrans was not going to purchase it, so the only alternatives were to buy it now or let the developer build on it. "The city council felt it would be a wise decision to purchase it now versus in the future, when it might be \$15 million or who

knows what," says the city's Director of Finance.²⁰



Photo: the view of the I-80/California Oaks Interchange from Lot "G."

Freeway interchanges are more than just another piece of infrastructure in Murrieta. They are the city's *raison d'être*. Before the 1982 expansion of I-15 connected it to the interstate highway system, Murrieta, situated 75 miles north of San Diego and 20 miles inland from the Pacific

Ocean, was a modest unincorporated town

of a couple thousand residents. Most of what is now the city was then dry, rolling hills and scrubby grassland, and the principal economic activity was horsebreeding. Townspeople still rode horseback down the main street to run errands, and residents were considered "newcomers" if they had lived there for less than 20 years.²¹ The freeway quickly transformed Murrieta into a booming bedroom community. It allowed thousands of commuters to settle in the area and drive to jobs in San Diego, San Bernardino County,

Orange County, Los Angeles, or Riverside County.²² By July 1991, when the city was incorporated, the population had grown by a factor of ten. That autumn, Time Magazine illustrated suburban California's sprawling growth with a 4-page foldout panorama of a new Murrieta housing development.²³

Nowadays, Murrieta's population exceeds 40,000, on its way to a projected buildout population of 75,000. The biggest problem the city faces is population growth that has outstripped a thin commercial tax base, making it difficult to fully fund basic services such as police staffing.²⁴ Murrieta has struggled to catch up with its rival to the south, Temecula, which has a similar population but three to four times the sales tax revenue.²⁵

The California Oaks Plaza is a good example of the kind of business Murrieta that wants more of. Located off Interstate 15 at the California Oaks Road interchange, the mall includes, among other things, an Albertson's Food Center, a Carl's Jr. restaurant, Blockbuster Video, Chief Auto Parts, and a 17-screen movie house, the largest in Riverside County.

"Access to the freeway is everything," notes Murrieta's head traffic engineer, Hank Moehle.²⁶ The 44-acre California Oaks Plaza site is well-located in that regard: it is directly adjacent to a 4-lane artery and a freeway interchange. However, it has long been recognized that this interchange would need further improvement to keep up with growing traffic. In 1991, the County completed a traffic impact study for the area which recommended the widening of California Oaks Road to six lanes, replacement of stop signs with traffic signals and wider freeway ramps. By the year 2010, the single-lane "diamond" style freeway ramps would need to be upgraded to 2-lane loop ramps.²⁷ The northbound loop ramp would occupy a 2-3 acre corner of the California Oaks Plaza site.

The takings issue that would later arise concerned whether the developer of this shopping center could be required to reserve or dedicate this 2-3 acre right of way as a condition of development. This in turn raises the question of the development's impact on traffic. Here, two facts seem to be undisputed. One is that the shopping center would *contribute* to the traffic that would be served by the loop ramps. According to a 1991 study paid for by the developer, a shopping center at California Oaks Plaza would generate an estimated 36,738 daily trips. However, the other point of agreement was that the cloverleaf would probably be needed eventually regardless of whether a shopping center went in at that particular site.²⁸

Originally the California Oaks Plaza site was being developed by a company called Merbanco Enterprises, an Irvine-based company backed by Canadian investors. Caltrans, as the lead agency for the planned interchange projects, took an active role in setting the conditions for Merbanco's subdivision. Caltrans held a veto power over the project because they could withhold the encroachment permit necessary for making improvements to the freeway interchange. In February 1992, Caltrans informed the city that if it wanted an encroachment permit to improve the interchange, it was necessary that "Parcel 5 [the site of the future onramp] shall be dedicated as future right of way with full access control and no construction of any kind will be allowed within that area."²⁹ In April the city approved the parcel map and plot plan, conditioned on dedication to the city of the aforementioned Parcel 5, noting that it was "to be used as future CALTRANS

right-of-way. No construction shall be permitted within parcel 5 prior to dedication to CALTRANS.”³⁰

As it turned out, Merbanco Enterprises did not survive California’s recession, and the California Oaks Plaza property was soon repossessed by Bank of America. In 1994, the property was acquired by a new developer, J.L. Management, named for its owner, Joe Lacko. In 1995, the city decided to go forward with some of the planned interchange improvements, including widening California Oaks Road, installing traffic signals, and widening the freeway ramps. Caltrans again applied pressure to ensure protection of the right-of-way that would be needed for the future loop onramp. As a condition of granting the encroachment permit for these improvements, Caltrans required the Murrieta city council to adopt a resolution which stated that the city agreed to condition any future developments “in such a manner as to insure that they will not encroach into the area needed to construct the future ultimate interchange configuration, thereby reserving land needed to accommodate these ultimate improvements to the I-15 off ramps at California Oaks Road.”³¹



Photo: a loop ramp at an interchange in neighboring Temecula.

Accordingly, when Joe Lacko applied for approval of his version of the California Oaks Plaza project, the City’s conditions of approval required that the right of way (now known as “Lot G”) be “reserved for use as a Park & Ride facility” until such time as “the lot is conveyed to CALTRANS for freeway improvements.”³² Says Lacko, “The city indicated they

would need to acquire the right of way. But they said they didn’t have the budget for it. They said, ‘We’ll buy it later when we need it.’”³³ This could be a long time, given that the new interchange was projected for the year 2010. Lacko was not pleased. He asked the City’s traffic engineer, “What are you going to let me do with it? Mow weeds on it for ten or fifteen years?”

He also objected to the idea that he should provide a Park and Ride facility. “I asked the City, ‘Who’s going to run it?’ he recalls. “They said, ‘You’re going to operate it.’ I said, ‘No, I can’t operate a public facility.’” In a letter, the City’s principal planner, Ernest Perea, informed Lacko that “the park and ride facility is clearly the responsibility of the property owner, and not the City. Further, the City is not in a financial position to

purchase the property for construction, operation, or maintenance of the park and ride facility.”³⁴

Lacko’s attorney told him that these requirements represented an unlawful taking of his property. Lacko took his complaint to the lead agency on the interchange improvements, Caltrans. Richard Standley, the chief Right of Way officer for Caltrans in Riverside County, recalls that Lacko was “pretty mad.” “He was threatening to sue the city. He told me the situation and asked me to see if there was anything I could do. He said this was some of the prime land on his development, right on the front of his development.” Standley contacted the Caltrans legal office in Los Angeles and they told him “the city of Murrieta could get sued big time.”³⁵

“(Caltrans attorney) Bob (Vidor) didn’t feel we were as liable as the City of Murrieta. But the State of California has the big pockets,” says Standley. Vidor, now retired, confirms that the *Nollan* and *Dolan* precedents were of concern in this case. “The city would be acting as a proxy for Caltrans. Work on a freeway interchange would be a Caltrans project.”³⁶

In May, Standley conveyed Caltrans’ concerns to Murrieta’s public works director, Ben Minamide, informing him in a letter that “I contacted our Los Angeles Legal Office and was informed that the City’s reservation may be construed, if challenged by Mr. Lacko, as Regulatory Taking. Under recent decisions by both the United States Supreme Court and the California Appellate Court...if a regulatory statute or ordinance goes “too far” it could be interpreted as a taking.” Referring to the City Council resolution of 1995 requiring that the Lot “G” be reserved as a condition of development, Standley wrote, “The legal staff advised me to contact the City and request that the Resolution be rescinded in order to avoid any legal action by Mr. Lacko.”³⁷

Meetings between the City’s attorney and Lacko’s attorney followed. Lacko’s attorney argued that the *Nollan* and *Dolan* decisions made this a taking. The City Attorney, John Harper of the firm Harper & Burns, concurred with Caltrans’ recommendation that the reservation requirement be rescinded. “We cannot require dedication due to...the *Nollan* Decision and the *Dolan* Decision...dedication is beyond nexus,” wrote Minamide in a memo summarizing his conversations with Harper. On September 25, 1996, the Planning Commission eliminated the reservation of Lot G from the project conditions. “Try as we did, we could find no realistic way to reserve or require dedication of this lot for a future on-ramp,” complained Minamide. “The only chance left now is if developer Joe Lacko chooses not to build on the loop on-ramp or funding somehow becomes available . . .”³⁸

Over the next few months, Minamide continued to try to find a way to dedicate or reserve the right of way. He discussed takings law with his staff and with City Attorney Harper, trying to persuade the latter that a nexus existed and that the conclusion of the Caltrans legal office represented a “myopic” view of the issue. He felt that since the reservation requirement flowed logically from the traffic mitigation provisions of the City’s general plan and California Oaks specific plan, a defensible nexus existed.³⁹ However, Harper maintained that “Current law limits the ability of a City to require the proposed fees that reflect the amount of proportional benefit of the improvement to the developing property...unless the development received one hundred percent benefit from those

facilities . . . the City can require the dedication, subject to the reimbursement of Mr. Lacko by others receiving benefit.”⁴⁰

Minamide also took the matter up with the Mayor pro tem, but the Mayor evidently concluded that to request an appeal at the City Council level would only result in a delay for the developer with no ready solution available.⁴¹

Meanwhile, Lacko was ratcheting up the pressure on the city to buy the land by obtaining permission to build on Lot G. He applied for, and was reluctantly granted, approval for two new buildings totaling 17,000 square feet.⁴² “We had tenants and were ready to build,” he says. The Murrieta planners were acutely aware of the situation in neighboring Temecula, which had allowed itself to become ‘built out’ without providing adequate freeway access. Now Temecula suffers chronic traffic congestion at its interchanges.⁴³ If Murrieta didn’t buy the right of way now, it would have to buy it later at a much greater cost.

Negotiations commenced. Lacko’s company pressed for approval of the final parcel map, warning that further delay could be fatal to the project.⁴⁴ In January 1997, the City reached an agreement with the developer giving the City a 5-year option to purchase the land. The City in turn agreed to immediately hold a City Council meeting to approve the final parcel map.⁴⁵ In June, the City used \$1.4 million in undedicated reserves to execute the purchase of the disputed right of way.⁴⁶

Murrieta officials remain frustrated that the city had to spend this money, believing that improvements of state highways should be the responsibility of the state. “We were disappointed with Caltrans. They did not live up to their responsibilities. It’s a state responsibility to build freeways, but they’ve left local jurisdictions with the responsibility,” says Planning Director Ernest Perea. “The city bought the land, but we’re going to end up giving the property to the state. Once the ramp is built it will be part of Caltrans’ right of way.”⁴⁷

Minamide, who now works for the city as a consultant says he can see Caltrans’ rationale for this position. “Why should the city have to take that burden upon itself? Because the interchange benefits the city. But smaller cities would have a heck of a time coming up with the money.” He is philosophical about the outcome. “Joe Lacko came out smelling like a rose. But that theater was sorely needed for this area.” Overall, he acknowledges, the City benefits from its interactions with Joe Lacko’s company. “He brought in the Home Depot on Madison Avenue. That’s our best sales tax revenue generating development. We owe that to Joe Lacko.”⁴⁸

Case Study #2: Santa Cruz County Trails Plan

The 1993-1994 debate over Santa Cruz County's "Trails Master Plan" exhibited the special type of acrimony one sees in local politics when people suddenly find the neighbor across the fence unmasked as a political and ideological foe. That the rights of homeowners to control their land was in question gave the issue added potency. On one side were trail advocates and trail users who wanted to promote access to open space for biking, hiking, and horseback riding by constructing and linking together trails throughout the county. On the other side were homeowners and property rights advocates who believed the trails advocates were plotting a "land grab" that would put public trails through their backyards.

Opponents organized a hugely successful grassroots campaign under the banner "Exaction equals extortion!"^{*} In the end, the trail plan was killed. This was either interpreted as a stirring victory for Constitutional rights or a baffling defeat for wholesome outdoor activity, depending on who you talked to. But none would dispute that it demonstrated how potent the concept of takings can be for mobilizing public opinion and swaying elected officials.

Although the formation of a citizen's Trails Advisory Committee by the Board of Supervisors in 1990 attracted scant attention, by the end of 1993 it was being vehemently discussed in every corner of the county. The thing people most wanted to argue about was the maps. The draft trails plan, which had not been publicly released, contained maps depicting a network of proposed trails, many of which crossed private property. If these lines on maps aroused suspicions, these suspicions were confirmed in the minds of many by the text of the draft plan, which stated: "Private property which underlies a trail corridor . . . may require a trail easement dedication as a condition of developmental permits."⁴⁹ "What it boils down to is a land grab by governmental agencies," said one rural homeowner, and hundreds of others agreed.⁵⁰

Trails plan opponents raised many related objections, among them liability, trespassers, fire risk, environmental damage, crime and loss of privacy. "It's quite different having your friends coming through than the public swarming through," said one resident.⁵¹ However, their central appeal, repeated in fliers, newspaper advertisements, mailers, campaign buttons, and on local radio talk shows, was the call to defend property rights from exaction of trail easements, which they termed "extortion."

The mobilization of opposition was largely the work of a newly-sprouted grassroots organization calling itself "Citizens for Responsible Land Use" (CRLU). One of the most active organizers of CRLU was Ken McCrary. The McCrary family goes back six generations in Santa Cruz County. Their company, Big Creek Lumber, logs redwood and Douglas fir in the heavily forested Santa Cruz mountains. The seeds of CRLU were planted when McCrary's mother Emma, an avid equestrian and volunteer trail-builder who was on the trails committee herself, showed Ken some of the maps that the

^{*} This slogan echoes Justice Scalia's widely quoted statement in the *Nollan* decision that the government had been engaged in an "out-and-out plan of extortion"

committee was drawing up. McCrary was alarmed, especially by the proposed trail depicted crossing family land about five miles north of Davenport. The family held a meeting to discuss the matter. Ken McCrary still remembered with distaste the way, a few years before, the County had exacted a trail easement when they were building a house for his brother on a forested parcel near the company headquarters. “We were all assuming that the trails were a done deal, and we were just going to decide where we thought would be the best place to put them. That’s when I decided no, I was going to fight it, these trails shouldn’t be there at all.”⁵²



Photo: a CRLU campaign button.

The irony of a son fighting the trail plan his mother helped develop was not lost on observers (a local newspaper termed the situation “poignant”).⁵³ McCrary, along with other volunteers such as Capitola realtor Nick Vrolyk, began phoning everyone whose property was crossed by proposed trails. They started holding community awareness meetings to rally support, began collecting donations (which poured in with surprising rapidity) and compiled a mailing list of all holders of rural parcels over five acres.

Momentum built as a local a.m. talk radio station picked up the issue. CRLU hired an Aptos land use lawyer for legal advice on takings and other issues. Soon they had a database of several thousand addresses, and as many as 200 people would show up for their community meetings. By the end of 1993, they were able to exert considerable pressure on the Supervisors, filling meetings with vocal supporters and bombarding the Board with postcards and petitions (By November 1993, they had submitted petitions with at least 1500 signers to the Supervisors).⁵⁴

McCrary, normally of a quiet disposition, found himself thrust into the role of political agitator and orator. “I never even raised my hand in a meeting before that, and there I was talking for three hours straight,” he says, still surprised at himself five years later. Sometimes emotions and rhetoric overheated. “No one’s going to come through my property or I’m going to kill them. . . . I’ll fight this to my death,” one angry woman, a resident of the rural, mountainous Bonny Doon community, told a newspaper reporter after a Supervisors meeting.⁵⁵ “In some issues I think you have to oversell things to get people motivated. But I actually had to understate the situation, otherwise you’d have a riot,” McCrary says. “These meetings were very emotional.”

Many trails supporters had difficulty understanding all this anger directed at them and their draft plan. “We were making every effort to stay within public lands and public corridors. But of course you’re going to have to make some connections,” explains former committee chair Colleen Monahan about the exactions language in the trails plan.⁵⁶ The fear generated by the exactions concept seemed disproportionate to her. After all, the plan clearly stated, “It is projected that required trail easement dedications

will affect only a very small number of parcels throughout the County.”⁵⁷ First priority would be given to using existing public and semi-public lands, followed by voluntary gifts of easements or purchase from willing sellers. As for the maps, which seemed to be at the root of so much of the ire, the draft plan noted in bold-face type, “These maps do



Photo: Last Chance Road, on McCrary property, location of one of the proposed trail alignments.

not convey rights to the public to use these recommended trail routes”; “these maps are conceptual, may not reflect the actual trail routes.”⁵⁸

Monahan was distressed at the calls to disband the trails committee and discard its three years of work. Harassing phone calls from angry neighbors eventually prompted her to connect her listed telephone number to a fax machine. “It changed my

perspective on the human race. I was disappointed by how few people were willing to sit back, take in information, and then make a reasoned decision.”⁵⁹

Trail committee members insist that property rights was a central focus of their discussions all along. “They kept portraying it as a bunch of outsiders versus ‘the property owners,’” says Monahan. “I kept saying ‘Hello! We’re property owners too!’” In fact, Monahan and her husband planned to dedicate a trail easement across the Bonny Doon property where they live and operate a small farm.

Opponents saw the committee as being one-sided and secretive. While there had been public notices of the Trails Advisory Committee’s activities, few paid attention until CRLU began to publicize the trail maps and the exactions issue. “I am outraged,” one property owner wrote to the Supervisors upon hearing of a proposed trail across her land. “Not only was I never asked or approached in any way; I have never received any notification of such from the County.”⁶⁰

Like Emma McCrary, Monahan had worked for years as a volunteer trail-builder. She played a key role in bringing about the formation of the trails committee by lobbying her County Supervisor, Gary Patton, a politician with environmentalist leanings, during the 1980’s. However, the genealogy of the trails goes back much further – to at least 1973, when the Supervisors adopted a new open space element for the general plan that envisioned a county-wide trails system. The 1980 general plan called for the designation

of generalized trails corridors on the County General Plan Land Uses and Facilities Maps to indicate areas to be considered for future trail development.⁶¹

The Trails Advisory Committee was established on July 17, 1990 to refine the generalized trail philosophy in the 1980 General Plan and prepare a Trails Master Plan for consideration and approval by the Supervisors. The stated goal was to “establish a County-wide network of trails which provide vital links between various parks, recreation areas, open spaces, natural reserves, riparian corridors, public beaches, urban areas, and trail systems within adjoining jurisdictions . . .”⁶²

The 26-member Committee included representatives from each district, including a number of organizational representatives. With the exception of a representative from the Board of Realtors, all the non-governmental organizations on the Committee represented trail users (for example the Association of Concerned Trail Riders and the Girl Scouts) or environmental interests (such as the Native Plant Society and the Santa Cruz Land Trust).⁶³

The Committee began holding twice-monthly meetings beginning in 1991. They studied materials and listened to guest speakers on trail planning topics, including “private property concerns”⁶⁴ They recorded known publicly owned lands and mapped “existing” trails and recorded these onto topographic maps and drafted the plan’s text. In June 1992 they submitted a preliminary draft to the Board. They continued to revise the plan with input from County staff. They also began to transfer their trails information onto computerized maps provided by the County Planning Department.⁶⁵

The Committee intended for the County to widely circulate their draft plan starting in the winter of 1994 for review and comments by public agencies, individuals and organizations in a series of public workshops. After further review, refinement, and drafts, the Board of Supervisors might make it an amendment to the County General Plan, but only after input from the Parks and Recreation Department, and public hearings before the Planning Commission and the Board of Supervisors. If adopted, it was expected that implementation would take decades.

Opposition increased in direct proportion to the nearness of the release date. The Supervisors were feeling enough heat that on November 2 they unanimously passed a resolution intended to defuse the “exaction equals extortion” issue. The resolution stated that trail easement exactions by the County must comply with state law and state and federal constitutional property rights protections, and promised to modify the general plan and county ordinances accordingly. According to newspaper accounts⁶⁶ and a planning staff memo,⁶⁷ the resolution reflected a fundamental change in County policy – although the language passed did not explicitly say so, Supervisors would in the future exempt residential property owners from the policy of seeking such exactions as a condition of issuing building permits. From now on, exactions would only be sought from applicants for subdivision or commercial or industrial development.

This was not enough to satisfy the plan’s opponents, however. The climax came at a Supervisors meeting on January 25, 1994, when the Board was to decide whether to proceed with the scheduled trails plan public workshops. After a heated, three-and-a-half

hour hearing attended by about 100 CRLU supporters, the Board took unanimous action and “drove three stakes through the heart of the plan.”⁶⁸ The three blows were a series of measures, enacted by unanimous vote, that effectively shelved the plan, disbanded the Trails Advisory Committee, and wiped the contested maps off the County records.⁶⁹

“The board had no choice,” said Parks Director Ben Angove. “There wasn’t enough oxygen for it [the plan] to live.”⁷⁰ Patton, the original backer of the trails plan concept, said his hand was forced by the “relentlessly negative” atmosphere surrounding the plan.⁷¹ Supervisor Symons, the supervisor most sympathetic to the plan’s opponents, remarked, “I cannot support continued review of a plan that contains so many objectionable items regarding property rights.”⁷²

Ken McCrary recalls this event as “the meeting where our fundraising dried up,” because afterward the issue began to fade from the public eye, as all but the most interested considered the matter settled. However, CRLU, spearheaded by Vrolyk, took an active role in the ongoing update of the general plan, which they feared might be used as a way to quietly keep the Trails Master Plan concept alive. Accordingly, they lobbied successfully to delete language referring to a Trails Master Plan from the updated general plan, and won new language about the protection of property rights. As initially proposed, the new general plan’s policy on trail easements had read:

Obtain trail easements, consistent with the Trails Master Plan, by encouraging private donation of land . . . where required for critical links. Require dedication of trail easements in new development projects located within mapped trail corridors or along adopted trail routes consistent with the Trails Master Plan. Within urban areas, require trail easement dedication within the specified buffer areas adjacent to riparian corridors and wetlands, and/or within the riparian corridor.⁷³

As a result of CRLU’s lobbying, the adopted language read:

Obtain trail easements by encouraging private donation of land, by public purchase, or by the dedication of trail easements, in full compliance with California Government Code Section 65909(a) for development permits and Government Code Sections 66475.4(b) and 66478.1 et seq. for land divisions, provided that state and federal constitutional rights of landowners are not violated. . . . Any trail easements so obtained shall not be put on any published trail maps until a complete trail from beginning to end has been obtained legally from the respective property owners, and only after adequate funds exist to implement a trail maintenance plan. . . . This policy is not intended and shall not be construed as authorizing the exercise of the County’s regulatory power in a manner which will take or damage private property for public use without the payment of just compensation in violation of the Constitution of the State of California or of the United States.”⁷⁴

CRLU did not achieve all its goals however. They were unable to persuade the county to give back trail easements it had exacted from homeowners in the past. And CRLU supporters such as McCrary and Vrolyk still worry to this day that the County might one

day revive the trails plan or something like it. Ironically, Monahan, who now professes no interest in being involved in further public trail debates, agrees. “When population pressure starts to build up, people will want more trails. But by then, land values will have gone up and they’ll have to pay ten times as much to get them.”

Vrolyk says that the Trails Master Plan aroused suspicion in part because it was so comprehensive. “This country has the habit to nibble away our rights. People in general are feeling afraid of government. It’s getting so big. It feels like a machine.”⁷⁵ For the immediate future, at least, it appears that Santa Cruz County is taking pains to assuage such fears. Vrolyk talked about a new trail the county is planning: “I have to give [current County park planner] John Akeman credit. He called me and said, “We’re doing this Monterey Bay Sanctuary Trail and I want you to know about it and be involved. I said “sure.” I have no problem with them doing the trail and getting easements if they go about it the right way. We prefer a trail by trail basis, going about it in a much slower, controlled way, so that people can know what’s happening and have some control over it.”⁷⁶

The planned Monterey Bay Sanctuary Trail, which is designed to enhance coastal access, is not the only trail-building effort that has gone forward in this piecemeal, more cautious fashion since the defeat of the Trails Master Plan. All have in common that they assiduously avoid private lands and the exactions issue. On and near the University of California Campus, volunteers are working on the “Yukon Trail,” which will connect Henry Cowell Redwoods State Park on the east of the campus with Wilder Ranch State Park and Gray Whale Ranch to the west, relying mainly on fire roads. “People have started working in other ways to develop pieces of the plan. They’ve fallen back on alliances that will work,” says U.C. ecology lecturer Margaret Fusari, who was a member of the original Trails Advisory Committee.⁷⁷ Another example is the Santa Cruz Circle Trail, opened in 1995, which strings together fire roads, sidewalks and existing trails into a 30-mile loop through the greenbelt surrounding the city of Santa Cruz.⁷⁸

Avoiding exactions has also been the rule in neighboring Santa Clara County, which abuts Santa Cruz County at the crest of the Santa Cruz Mountains. Part of the Santa Clara County’s success in adopting a trails master plan in 1995 can be attributed to political demographics – the high demand for outdoor recreation in the densely populated Silicon Valley, for example. But it also has to do with the way the Santa Clara trail planners carefully skirted thorny issues of property rights and takings. Unlike the Santa Cruz County Trails Advisory Committee, which was dominated by trail user groups and environmentalists, the Santa Clara County trails task force was carefully composed to include substantial representation from landowner and business interests. The group’s first major recommendation: no trail routes through private land, unless easements can be acquired from willing sellers.⁷⁹

Furthermore, the Santa Clara trails planners were very careful to avoid producing the type of maps that brought their Santa Cruz counterparts so much grief. ““No lines on a map!” was our rallying cry,” says Patrick Miller, a planning consultant who worked with the Santa Clara trails task force.⁸⁰

The question naturally arises, does putting a proposed trail on a map violate anyone's property rights? Probably not (unless it can be shown that the action was *intended* to reduce the property value, i.e. as an expedient to make the land cheaper to condemn).⁸¹ Does exacting a trail easement from a homeowner seeking building permit violate the law? The answer is maybe, depending on the circumstances. But such legal subtleties may be beside the point in the Santa Cruz case. What mattered most was the ability to exert political pressure on elected officials. As Supervisor Patton puts it, this was a case of "public hostility – total rejection." "The takings issue seemed to give people a reason founded in the Constitution for thinking this was wrong," says Patton. "In the court of public opinion, the idea that you'd put an easement over someone's property – that was a taking." Whatever the Supreme Court might have said about the takings and property rights issues raised in Santa Cruz, it was really the court of public opinion more than the Supreme Court that prevailed here.

This is not to say that there were no genuine legal issues involved. "The board's change in the language was partly a political response and partly a legal response – you can't separate them entirely," says County Counsel Dwight Herr. "Some members of the public raised legal arguments. There was vocal opposition and some grounds for opposition. From the legal standpoint it was based on the Supreme Court decisions such as the *Dolan** and *Nollan* cases. It seemed risky to require easements as a condition of development approvals unless the need could be attributed to the developments, rather than just because the public at large would benefit."⁸² As then-Supervisor Fred Keeley[†] notes, "They called it extortion. I'm not sure that's a completely unfair characterization of it. That [the language on exactions] was probably a strategic error. But how is the county going to do it? They don't have the capital outlay funds to buy anything." Ideally, Keeley says, this aspect of the plan would have been implemented by making deals with landowners – for example, giving them development rights or approval for higher density use than they would have gotten otherwise.⁸³

Trail proponents felt bitter afterward that their plan was never publicly aired in the planned series of workshops and hearings. They may well have been able to muster considerable support in those meetings. After all, although Santa Cruz, with its extensive rural and agricultural areas, has more than its share of conservatives, libertarians, and folks-who-just-want-to-be-left-alone, it is also the home of the solidly liberal university town of Santa Cruz (sometimes derided as the "People's Republic of Santa Cruz"). Perhaps trail users and environmentalists would have organized and rallied to the defense of the trails plan.

But it is doubtful that the Board of Supervisors, even those most sympathetic to the trails plan, would have relished embarking on a series of public forums when a large, organized and vociferous opposition already occupied the strategic high ground. "As that old shampoo commercial said, you don't get a second chance to make a first impression," says former Supervisor Keeley, "and we were always trying to dig ourselves out after that first impression... It threatened to overshadow everything else being done in the general

* Although the *Dolan* ruling had not yet been made, some participants in the Santa Cruz debate were aware of the case.

† Keeley is now a member of the California Assembly.

plan update.” One likely outcome of continued debate was that the trail proponents would have been routed. As former trails committee member Fusari observes, “A really focused, dedicated group will always prevail. With diffuse benefits, [trail users] are not as likely to leap into the battle.” The next most likely outcome, and the worst scenario for the supervisors, was a vicious pitched battle with the Supervisors in the middle. Better, they likely reasoned, to put the trails plan to rest.

Case Study #3: Public Access at Whaler’s Cove

Whaler’s Cove in southern San Mateo County could be considered one of the most appealing public recreation sites in Northern California, but for one flaw: except at low tide, there is no legal way for the general public to get to it. Whaler’s Cove is a small inlet flanked by rocky outcroppings at the foot of the historic Pigeon Point lighthouse, about 10 miles south of Pescadero. Although the State owns the beach, it doesn’t own the sole trail to the beach, which crosses a parcel owned by a local resident, Kathleen McKenzie. McKenzie is turning that lot into a bed-and-breakfast inn and wants to enforce her right to exclude the public from her property. The County and later the California Coastal Commission considered exacting an easement for a public trail as a condition of approving her development. But both agencies ultimately concluded that such a dedication would violate the Supreme Court takings precedents.

I visited Whaler’s Cove last June. Fortunately there was a strong low tide on the morning I arrived. McKenzie was reluctant to grant me permission to use the trail because she would be unavailable on the day I had planned to come and she wanted to be present if I crossed her property. However, a Coastal Commission staff member, Steve Monowitz, offered to walk me to the cove at low tide by traveling along the shoreline from the south.

To reach the site from Santa Cruz, we headed north on the coast highway, which runs along gently sloping bluffs backed by the forested foothills of the Santa Cruz mountains. Much of this land is protected open space owned by the Peninsula Open Space Trust. Farmers grow brussel sprouts and artichokes on the bluffs, and some of their fields stretch right to the edge of cliffs overlooking the Pacific surf. The waters here belong to the Monterey Bay National Marine Sanctuary. I was fortunate to pick a spectacularly sunny day (summers here are often chilly and foggy). There were riots of blooming hemlock and mustard along the road, and a crisp breeze kicked up whitecaps on the Pacific. “There’s a strong wind from the northwest here from April through August,” Monowitz said. “People say, why do you care about this one little beach? But Whaler’s Cove is the only one that’s sheltered from that northwest wind.” We passed a broad, sandy beach that was completely empty. “You can see it’s really blowing down there,” said Monowitz. “There’s no one on Scott’s Beach. They’d get blown away.”

It is easy to spot Whaler’s Cove from a distance, because it is nestled at the base of a small promontory, on top of which stands the Pigeon Point Lighthouse.* The lighthouse was constructed in 1871 after a series of shipwrecks among the reefs and treacherous

* The lighthouse is a California State Historic Landmark and is on the National Register of Historic Places.

currents offshore. Pigeon Point is named for the merchant clipper *Carrier Pigeon*, which went down on a foggy night in 1853.⁸⁴

Our first stop was a visit to the lighthouse. It is unquestionably picturesque, but it has long coexisted with less romantic structures. In the late 1800s, Pigeon Point was the location of a small shipping and whaling station. Crops were loaded by boom and cable onto ships. Today the site is shared by a group of bungalows belonging to a youth hostel. On the other side of the lighthouse is McKenzie's parcel, which contains a few 1960s-vintage buildings left over from a defunct oyster farm.

The trail to Whaler's Cove is right off the highway, next to the road leading to the lighthouse. The path is blocked by a wire fence and a "Private Property" sign, but the torn sign and trampled fence testified that there were still some who still feel entitled to use the trail regardless.

We were not planning to trespass, so we went half a mile back down the coast to another entry point on county land. We climbed down a crude path on the face of the bluff, and worked our way toward Whaler's Cove along the narrow, rocky shoreline. This is a dramatic stretch of coast, with great slabs of sedimentary rock thrusting out of the shore and surf at strange angles. Perhaps in part because of their relative inaccessibility, the tidepools here are pristine and teem with life. "I've heard you can go out there and pick

abalone right off the rocks," Monowitz says.



Photo: Whaler's Cove.

This was an 0.7-meter low tide. Monowitz says that when the low tide is 1 meter or higher, our route can be blocked by waves. When we reach Whaler's Cove, there is a fine little beach, the air and sea are calm, and the bluff and rocks sheltering the cove create a feeling of sanctuary. We have a view of Año

Nuevo Island six miles to the south. Seals and sea lions on occasion haul out on this beach, and the bluff above is a good vantage point to watch migrating gray whales. The cove is a calm place where local fishermen can launch and land their boats. In the late 1800's, it was Portuguese whalers who launched their boats, and returned to haul their catch ashore.⁸⁵ Some of the old pilings and concrete mooring blocks can still be seen.

As the *San Jose Mercury News* noted, “A small coast-side bed-and-breakfast inn didn’t seem an issue that would ignite a fiery debate.”⁸⁶ But the state of affairs at Whaler’s Cove has left many members of the public, not to mention some Coastal Commission staff, feeling frustrated. At the same time, McKenzie feels the wrangling over the access issue led to unnecessary, costly delays in the processing of her permits.

The conflict dates to 1994, when McKenzie repaired the fence at the site and installed new “no trespassing” signs to keep people off the trail.⁸⁷ McKenzie says liability concerns were part of the reason for restricting access. “Children were being allowed to run loose all over the property. I was concerned about their safety and my liability.”⁸⁸ At the same time, she was ready to establish a business on the site and wanted undisputed control over the trail. When she and her husband originally bought the property in the early 1980’s, they had intended to build a home, but a divorce put an end to that plan. McKenzie then considered various business ideas, including aquaculture, before deciding to build an inn.⁸⁹ Her attorney, Harry O’Brien anticipated that the Coastal Commission might try to force her to grant public access to the beach. “The Coastal Commission’s regulations provide that in determining whether they could take a public access easement, they would consider whether there was historic public use. We wanted to take that issue away from the Commission’s staff. If they were going to look at that, we wanted them to do it in a court of law.”⁹⁰

To accomplish this, McKenzie filed a “quiet title” action against the State. If successful, such an action would prevent the State from claiming that the history of public use created an implied dedication to the state of the accessway. Although the Coastal Commission found many people willing to testify that they had for years used the path unimpeded, this was countered by testimony from employees of McKenzie that she had in fact exercised control over who used the path. Not wanting to litigate the case, the Attorney General’s office agreed to a settlement that granted public use of the beach, but granted McKenzie undisputed title over the path.^{91*}

Meanwhile, McKenzie applied to the County of San Mateo for a coastal development permit to build her inn. Her parcel occupies an 875-foot length of jagged bluff that varies from 120 to 300 feet in width.⁹² The final design called for nine cabins in three detached clusters, each cabin having its own kitchenette. An existing 1800 square foot structure would be converted to use as a storage and maintenance building.

County Planning Commission hearings on the permit were dominated by the access issue. The County’s Local Coastal Program requires the establishment of a shoreline access trail as a condition for obtaining a permit for commercial development.⁹³ One of the most outspoken proponents of public access was Mark Nolan,[†] whose nonprofit “Pigeon Point Environmental Education Program” regularly led groups of school children to Whaler’s Cove to teach them about coastal ecology and maritime history. Nolan says he started bringing the groups to Whaler’s Cove in 1984, and averaged about 1000 kids every year

* The “public trust easement” automatically grants the state ownership up to the mean high-tide line. The settlement granted the state an additional easement extending to the toe of the bluff.

† No relation to the litigant who made legal history in the *Nollan* takings case.

by the time the fence went up in 1994. The cove had also long been a popular destination for tourists, divers, kayakers, and fishermen.

However, the County quickly decided that it could not require a dedication of the access route. The County's Planning Administrator wrote in a memo that "Under recent Federal Supreme Court decisions (Nollan vs. California Coastal Commission among them), the general rule is that neither the County nor the State may require McKenzie to dedicate beach access to the public unless it can be shown that her project interferes with existing public access. The project does not interfere with any existing public access, therefore dedication of access to the beach cannot be supported."⁹⁴



Photo: The McKenzie property, from Highway 1. In the foreground, to the left of the wooden fence, is the entrance to the gully that people have used as a beach access trail. It is partially blocked by a wire fence which has been repeatedly trampled or knocked down.

The County Planning Commission approved the project in December 1995 with 29 conditions covering everything from drainage, design and landscaping to restrictions designed to prevent encounters between visitors' dogs and the local seals.⁹⁵ The County saw much to like about the project. Visitors would "have greater ability to enjoy the visual and

recreational opportunities of the coast by staying overnight...the applicant and her consultants, in close consultation with County staff, designed a project that would compliment the aesthetic values of the site, and result in minimum impact to existing views of the lighthouse and the ocean."⁹⁶ To help reach agreement with the County, McKenzie proposed to negotiate limited access agreements with educational groups and some of the fishermen who had claimed prior use of the cove. With her concurrence the County made this a condition of approval for the project.⁹⁷

This last condition was not entirely successful in defusing conflicts over access. McKenzie reached an agreement with some of the fishermen, but the discussions between her and Nolan broke down over issues such as limitations on the number of visitors and the duration of the agreement. "They wanted very, very tight constraints on the times kids could be down there. They also wanted a three year limit on the agreement, so that after three years it would have to be renegotiated," says Nolan.⁹⁸ O'Brien asserted that

the renewal clause was needed so the deal could be reworked in case of unforeseen circumstances.⁹⁹

In January 1996 Nolan appealed the County's permit approval to the California Coastal Commission, fearful that he would have no leverage once the appeal deadline passed. He hoped that the Commission would require the conclusion of the access agreements to be a precondition of issuing the building permits.¹⁰⁰

The Coastal Commission received over 200 letters in support of Nolan's appeal.¹⁰¹ Many were from parents, teachers and children who had participated in the school tours organized by Nolan's program. "I am a fifth grade student at Loma Prieta School and have just gotten back from Science Camp. It was a wonderful experience for me and it would be a shame to close off the beach. I would also like my brother to go. He is in the second grade and is so excited to be able to go when he is older," read a typical letter.¹⁰² Nolan also enlisted support from the San Mateo County Office of Education and an environmental group, the Committee for Green Foothills.¹⁰³

Some of the opposition to McKenzie's plans took extreme forms. She received threats, and at one point someone set fire to the fence on her property. "To this day, I won't go on the property alone," she says.¹⁰⁴

The Coastal Commission staff reviewed the case and found a wide variety of issues which it felt had not been addressed adequately by the County, including the public access question. Its general conclusion was that more information and analysis was needed. Aside from access, other issues raised included the project density, water supplies, drainage and erosion, and impact on views.¹⁰⁵

The law that created the Coastal Commission, the California Coastal Act, requires public access from the nearest road to the shoreline as a condition for the approval of coastal development projects.¹⁰⁶ In addition to the public access provisions of the San Mateo County Local Coastal Program and the Coastal Act, the staff cited the California Constitution, which states, "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water..."¹⁰⁷

The staff report argued that the County's review of the access issue had been insufficient: "Before a conclusion can be made regarding the subject project's conformance with Coastal Act access policies, an in-depth, project specific access analysis must take place."¹⁰⁸ The report implied that the County had misconstrued the *Nollan* decision, and questioned the requirement that McKenzie negotiate access agreements with beach users, calling it "unenforceable because it gives the ultimate authority regarding access agreements to the property owner."¹⁰⁹

These issues were debated at a heated two-hour Coastal Commission hearing on April 10, 1996. Members of the public testified emotionally about the value of the site. Old arguments about who had used the trail and under what circumstances were replayed all

over again. Nolan testified that the terms of access McKenzie wanted to enforce would prevent some of the children from visiting the beach. “We all support the public going to the beach,” McKenzie’s son said. “[But] if one of those little kids falls down there, who are they going to sue? My mom.”¹¹⁰ For her part, McKenzie felt that by offering to negotiate such access arrangements she was already doing more than the law required.¹¹¹

The Commissioners concluded that they needed more time to sort through the conflicting assertions about the project, and chastised County planners for not resolving these issues. “I’m extremely disappointed that we had about two hours of public hearings when basic questions about the viability of a project have not been answered. This is just an abysmal failure of the system, and I apologize to everyone,” Commission Chairman Carl Williams said at the conclusion.¹¹²

If the staff initially leaned toward providing stronger public access conditions on the project, subsequent analysis of the case and the legal precedents soon made it clear that there was little they could do to strengthen the access requirements imposed by the County. Staff analyst Steve Monowitz recalls, “I took an initial shot at trying to assess what actual impacts of the project were. Given that we were bound by the settlement agreement [on prescriptive rights], the only impact I could come up with was intensification of the use of that beach and the surrounding area by the hotel’s visitors. That takes up beach area that could otherwise be used by the public.”¹¹³ In other words, since the access route across McKenzie’s property was not public to begin with, no case could be made that she should mitigate the impact of closing that route. However, since she was bringing in additional users, the case might be made that she should provide public access to make up for the impact that additional visitorship would have.

Not surprisingly, this argument didn’t get very far when presented to Coastal Commission Deputy Director Tami Grove and Diane Landry, legal counsel in the Commission’s central coast office. “I made that argument and we said, ‘well, what really is the intensification of use and is it large enough to require them to provide new access under the test of rough proportionality?’,” Monowitz recalls. “The conclusion was that the nine units wouldn’t always be at 100% occupancy, and the requirement wouldn’t be proportional to the impact of the project.”¹¹⁴

Commission staff was also keenly aware that McKenzie’s attorney O’Brien would oppose the imposition of additional public access requirements. “I was on the phone with him constantly,” Monowitz says. “We had some pretty fierce debates about whether the dedication was roughly proportional. It was clear they were going to fight us tooth and nail on it.”

On June 27, 1996, the Commission staff issued a new report, this one recommending conditional approval of the permit. The new report differed markedly from its predecessor by acknowledging that “the minor increase in the intensity of beach use that will result from the [project] will not reduce the public’s ability to access or recreate on Whaler’s Cove beach, and therefore does not provide a nexus for a public access requirement pursuant to the *Nollan* decision. Similarly, a requirement for public access would not be proportional to the insignificant impact of a few additional beach users, and can not be pursued consistent with the precedent set by the *Dolan* case.”¹¹⁵

The last major regulatory obstacle to the project had now been cleared, although the Coastal Commission would not give the green light until other issues had been resolved to their satisfaction, including questions about the septic and water systems. In late 1999, the project was nearing the construction phase, five years after McKenzie first applied to the County for permits. “Five years is a long time for nine units!” McKenzie says.¹¹⁶ “Visitor-serving facilities that are called for in the Coastal Plan should not be subject to the kinds of delays that this project was.” Her attorney, O’Brien, agrees: “It was unfair and wrong for the Coastal Commission to reopen the access issue. It delayed the project by a considerable period of time and at considerable cost.”¹¹⁷

Although Whaler’s Cove is an exceptional place, the outcome of the debate over public access there has probably been repeated in many other locations. According to Peter Douglas, Executive Director of the California Coastal Commission, “There are hundreds of new homes and other new developments fronting the California coast or other publicly owned recreation areas that were given permit approval without reserving the opportunity for future public access...Since *Nollan*, the Coastal Commission and local coastal governments no longer seek offers to dedicate public access or public trail easements in 9.9 cases out of 10 that previously would have included such provisions.”¹¹⁸

Case Study #4: El Dorado County Updates its General Plan

The update of the El Dorado County General Plan was a contentious, costly seven-year process. Property rights and takings arguments played a role in decisions ranging from open space and river protection policies to the land use designations on individual parcels. However, takings issues were only one among the many factors influencing this complex political process. At issue was not just property rights, but the future growth and development of the whole county.

The El Dorado County land use debates can be seen as a battle between two basic viewpoints. On one side were a minority of the planning commissioners and county supervisors, who were backed by citizens and nonprofits that favored slower growth and stronger environmental protections. On the other side were majorities on the Planning Commission and the board of supervisors who favored smaller government, less regulation, and more deference to property rights. They were backed by property owners and other citizens who felt threatened by proposals for new land use restrictions. Those favoring this point of view tended to regard the county’s own planning consultants and planning staff with suspicion, and eventually wrested control of the planning process away from them. At that point, they were able to build more property rights protections into the plan, and to make a variety of changes that provided relief to property owners who felt that the plan threatened to reduce their land values.

The Setting

Land use planning is perhaps the most divisive subject in El Dorado, a county that encompasses over a million acres of rugged, scenic land from the shores of Lake Tahoe down to the city of Placerville and the mushrooming commuter communities of the Sierra foothills. In 1996-1997 alone, there were at least 10 lawsuits against the county over

various development projects.¹¹⁹ This is not counting the costly, complex lawsuit brought by environmentalists that in 1999 halted implementation of the General Plan for violations of the California Environmental Quality Act (CEQA). That lawsuit has all but frozen major development in the county for the time being.

The main source of this controversy is population growth. This mass migration into the Western Sierras has been called the “Second Gold Rush” (the discovery of gold on the American River near Coloma in 1848 gave El Dorado County its name – “the Golden County”). As a result, much of the western part of El Dorado County has become an exurb of the Sacramento metropolitan region, and is home to a growing population of commuters. The population of the County grew by 38,000 between 1988 and 1998, a 34% increase.¹²⁰

Since most of the new development occurs in unincorporated areas, the County is the principal planning authority. As Timothy Duane, a land use scholar who has studied this region observed, “The fundamental force is the desire of new residents to live “in the country” with wooded, open spaces shielding their “homestead” from the view of neighboring homes...Contact with the community comes through regular visits to the nearby town center.” However, in recent years large-scale housing developments have been increasingly common.¹²¹

Most residents say they value the County’s rural character, but this means different things to different people. For some, population growth threatens the County’s natural beauty. For others, it provides economic opportunity. On the one hand, the County has traditionally had an economy based on timber harvesting and mining, and some blame environmentalists for lost jobs and productivity in these sectors. On the other hand, tourism and outdoor recreation now rival these industries (more people are employed in El Dorado County in the hotel industry than in the timber industry).¹²² Many residents work outside the County, and have little personal stake in local economic development. Others, often long-time residents, have invested in or inherited land that they would like to subdivide someday. Some decide to live here to be closer to nature and bring with them support for environmental causes. Others come seeking quiet residential communities free of urban social ills.¹²³

The Board of Supervisors took on the task of balancing these conflicting interests when, in 1989, it embarked on the development of a new general plan. Due largely to population growth, the general plan had over the years been gradually rendered internally inconsistent (and hence in violation of state law) through the adoption of dozens of amendments every year.¹²⁴

The First Draft: Planning Consultants Run Into Trouble

To draft the new plan, the County hired the San Francisco consulting company Sedway Cooke Associates. Sedway Cooke developed background documents, held public workshops, and in October 1992 issued the First Administrative Draft General Plan.

Sedway Cooke’s draft, especially its policies on environmental protection and land use and its emphasis on clustering development to preserve open space, aroused a strong

reaction from many county residents. Some criticized the plan for not restricting growth enough. “The projected growth figures of Sedway Cooke are frightening,” wrote a fourth-generation resident. “We are not happy with the urban sprawl that has taken place in the last 20 years.”¹²⁵ However, a very vocal segment of the population believed that the plan was excessively restrictive and endangered property rights. What attracted the most ire was the plan’s land use element and land use maps, which down-planned many residents’ property. Hundreds signed petitions protesting the imposition of 20-acre minimum parcels, or wrote letters describing the hardship they would face under proposed land use designations. Activists who circulated the petitions also provided residents with pre-printed cards to mail to the Board of Supervisors protesting down-zoning and the “taking of private property without just compensation, i.e. by regulation.”¹²⁶

Among the letters of protest, many spoke of personal hardship. One man wrote on behalf of his sister, “an elderly single woman who purchased this land and paid county taxes on it for the past 26 years, out of her wages as a nurse for the Veterans Administration. The proposed down-zoning and resulting devaluation of her property will be a severe financial blow to her, and this her nest-egg, in her now retirement years.”¹²⁷ “When we purchased 13.6 acres in 1974, it was all we could afford,” wrote another, who threatened to stop paying taxes or file a class action lawsuit.¹²⁸ One writer, protesting the inclusion of “scenic corridors” that would restrict development along specified rivers and highways, wrote, “If we the people want these view corridors, then we should be willing to pay for them.”¹²⁹ Protests were of course based on many grounds besides property rights, from fairness to economic considerations. For example, a developer wrote to protest a change that would reduce a housing development from 983 units to 360 units or less, calling the change “economically and environmentally undesirable” and calling his project “precisely the sort of land use which is needed for this area.”¹³⁰

“What was being shoved down the County’s throats was completely ridiculous,” says Walt Shultz, a local real estate agent who was motivated by the general plan controversies issues to seek and win election to the Board of Supervisors in 1994. “It was overly aggressive. If we keep choking off all development and light industry, where are we going to get decent jobs?”¹³¹

The Board of Supervisors took the takings rhetoric seriously, but there is no evidence that they found it necessary to change any policies to protect the county from litigation. “The issue of down-zoning and property rights kept coming up and coming up,” recalls former Supervisor Bill Center. “We had board members who were concerned about it. I was concerned about it. But it was really a political and emotional plea. It was clear, and I think the Board was clear, this didn’t rise to the level of a taking.”¹³² Deputy County Counsel Ed Knapp concurs: the idea that the land use restrictions in the draft versions of the general plan might be compensable takings “is not a question that came up in any serious way... You can down-plan a vacant parcel and its not a taking, period, end of story.”¹³³

Among the strongest critics of Sedway Cooke’s work were members of the Planning Commission. As a Planning Commission report would later assert, “The public, in reacting to the release of the Sedway Cooke General Plan...expressed surprise, confusion

and concern. Many felt the draft was overly restrictive, complicated and did not reflect the balance between planned growth and property rights as envisioned during the work shops.”¹³⁴

The Second Draft: County Planning Staff Tries its Hand

Under criticism not only for the content of the draft plan but also its cost, the Supervisors soon dismissed the consultants and turned the general plan process over to their own planning department. The planning staff released its Second Administrative Draft General Plan in July 1993. The planning department produced a draft that differed substantially from its predecessor. However, it pleased the Planning Commission even less.

The Staff’s “Second Administrative Draft”...became even more land use restrictive and less economically sensitive than the Sedway Cooke draft...Following the release of Staff’s draft plan, public testimony was heard by the Board of Supervisors and the Planning Commission during the evenings of 26 and 28 July 1993. Of the 100 members of the public who spoke approximately 85% expressed policy specific or general opposition...The general comments expressed concern that staff’s draft was too rigid, too restrictive, and too detailed for a general plan...It dictated the mechanism for bigger, costlier government and did not acknowledge the rights of private property owners.¹³⁵

The Board of Supervisors agreed the plan needed more work, so it turned the staff’s draft plan over to the Planning Commission for review and revision.

The Third Draft: The Planning Commission Takes Over

In retrospect, turning the plan over to the Planning Commission was a victory for property rights advocates, but at the time the political situation seemed very fluid. The election of November 1992 had seen three incumbents lose their seats.¹³⁶ Bill Center, the most pro-environmentalist Board member, believed that the newly elected Supervisors would favor slow growth, and that the main effect of involving the Planning Commission would be to “buy a year to get a solid majority on the Board. But exactly the opposite happened. We didn’t see which way the trend was going.”¹³⁷ What happened instead was that the Planning Commission aggressively reworked the proposed general plan, and the new Board of Supervisors showed little inclination to interfere.

At this time, the five members of the Planning Commission were John Wolfenden, Tom Mahach, Jon Hamilton, Ray Griffiths, and George Osborn. On contested issues having to do with growth management or environmental issues, the Commission tended to split 3-2, with Wolfenden and Griffiths siding with environmentalist or slow-growth interests, and Hamilton, Mahach and Osborn tending to vote in favor of regulatory relief for landowners and developers.

Osborn, perhaps the most outspoken of the Commission’s majority, also served as president of a grassroots advocacy group called El Dorado Property Owners for the Protection of 5th Amendment Property Rights (also known as “Fifth...or Fight”), a group

that had helped organize opposition to the Sedway Cooke draft plan and the county planning staff's Second Administrative Draft. In January 1993, while the county planning staff was working on its draft, Osborn had commented in the "Fifth...or Fight" newsletter,

One would think that after the "*Lucas*" case before the U.S. Supreme Court, our County Planners would get the message. In "*Lucas*," the Court interpreted the "setback" rules placed on Lucas' land as a "taking," which deprived Mr. Lucas of any economic value. Under the *Fifth Amendment to the U.S. Constitution*, Mr. Lucas must be compensated accordingly. Can El Dorado County afford to compensate all affected landowners for the "Scenic Corridor" setbacks? Obviously not. Clearly private property cannot be taken for public use without just compensation. As we consider "open space" and "recreation" and "preservation of wildlife habitat" and these infamous "scenic corridors," let us not forget that there are costs associated with each of these items.¹³⁸

It would, however, be an exaggeration to say that Osborn or the other commissioners were motivated primarily by the takings issue. Property rights protection was one piece of a broader agenda calling for smaller government and less environmentalist/slow-growth influence on the general plan. "Planners in El Dorado County are armed with many "wonderful" ideas...but most have no sense of the associated costs both in economic terms and individual freedoms," Osborn wrote. As another "Fifth...or Fight" member concluded in a letter to the editor of a local newspaper, "We must...concentrate on reviving our economy with government helping, not hindering the private sector."¹³⁹

The Planning Commission Versus The Planning Staff: A Clash of Ideas

On November 1, 1993, the Planning Commission, represented by Chairman Hamilton, formally presented the new Third Administrative Draft of the general plan to the Board of Supervisors. The Commission's presentation informed the Board that the new draft exhibited "a consistent acknowledgement by the Commission of the public's desire for less government, less "plan" induced costs, and more flexibility in protecting both the environment and property rights."¹⁴⁰

In explaining these changes, the Planning Commission rarely if ever attributed a *specific* action to concern over takings. Clearly, property rights had an influence, but as part of a broader philosophical dispute with environmentalists and others who would do more to restrict growth. As the Planning Commission put it,

...the residents of El Dorado County do not agree with the European approach to land use, as advocated by staff and the former consultant. Forcing people through general plan restrictions to live only in urban centers or villages, while reserving the countryside for non-developed uses is not an American concept of retaining and enjoying the "rural atmosphere." A "rural atmosphere" to many of the County residents means actually living on parcels of land in the rural area and not just visiting the countryside from crowded apartments or jammed together houses in the urban center.¹⁴¹

The Commission said that its changes were motivated by its sense of public opinion as heard in the various workshops and hearings and in written comments that had been submitted. The Commission viewed property rights as one of the primary themes of the public input: “The document produced through this process is a product of the majority of the citizens and property owners of El Dorado County who participated in the many public workshops, hearings and requests for written input. These citizens cared enough, through their involvement, about future generations...to pass on to those generations not only the natural treasures of El Dorado County but the Constitutional right to privately own and enjoy a portion of those treasures.”¹⁴²

It was in this spirit that the Planning Commission made numerous changes to the County staff’s plan, far too many to enumerate here. However, a sample conveys the overall flavor. Below are some passages from the annotated Third Administrative Draft. As in the original, deletions of the previous draft language are indicated with strikeouts, while underlining indicates text added by the Planning Commission. While the individual changes were not explicitly linked by the Commission to property rights, the changes were consistent with their desire to ease restrictions on the density and intensity of land use and avoid mandatory requirements for land set-asides. Each of these changes was passed by a 3-2 vote of the Planning Commission.

1) The overall policy directives were changed to avoid language about limiting growth in specific areas of the county. For example: “The development of these visions and strategies serves to provide for the underlying approach of the General Plan. This approach is the identification of distinct planning concept areas where growth will be directed ~~and where growth will be limited~~ as a means of providing for a more manageable land use pattern...Specifically, the Plan will direct planned growth to Community Regions and Rural Centers and ~~limit~~ provide for planned growth within Rural Regions.”¹⁴³

2) Originally, specific plans for new communities were to require mandatory developer contributions of bicycle and pedestrian paths, transit stops, parking, and open space for sensitive habitats. These mandatory design features were changed to “negotiable design features.”¹⁴⁴

3) The “Rural Residential Low Density (RRL)” designation was eliminated. It would have required minimum parcel sizes of at least 40-160 acres. In place of the RRL designation, such lands would now fall under the Rural Residential category. As for the latter, the revised plan doubled the maximum density for that designation from one unit per 20 acres to one per 10 acres.¹⁴⁵

4) The “Natural Resource” land use designation, which allowed densities of only 1 unit per 160 acres was the most restrictive land use designation in the original plan. It was changed to reduce the types and amounts of land it would affect, in particular making it a designation to protect economic values rather than environmental ones: “~~The purpose of this land use designation is to protect~~ The purpose of the Natural Resources (NR) designation is to identify areas that contain economically viable natural resources and to protect the economic viability of those resources and those engaged in harvesting/processing of those resources from interests that are in opposition to the

managed conservation and economic, beneficial use of those resources. The important natural resources of the County includes ing forested areas, and ~~important watershed and river canyons, critical wildlife habitat, rare and endangered species habitat, mineral resources, wetlands, lakes and ponds, and areas where the encroachment of development would compromise those natural resource values.~~^{146 *}

5) Mandatory open space requirements were eliminated for the Planned Development Combining Zone Districts. These districts were intended to allow clustering of residential, commercial, and industrial land uses. The original language required that 40% of each development site in such a district be set aside for “commonly owned or publicly dedicated open space lands...” The revision changed the “shall” in the open space requirement to a “may,” and made the amount of open space negotiable.^{147 †}

6) The revised plan eliminated prohibitions on development on steep slopes: “Disturbance of slopes forty (40) percent or greater shall be ~~prohibited~~ discouraged to minimize the visual impacts of grading and vegetation removal. ~~Setback restrictions or building envelopes shall be designated on all development projects prohibiting development on slopes forty (40) percent or greater.~~¹⁴⁸

7) The revised plan also eliminated setback requirements for streams, rivers, lakes, and wetlands.¹⁴⁹

8) In the section on rare, threatened and endangered species, the revised plan eliminated a policy calling for the preparation of Habitat Conservation Plans to protect sensitive plant and animal species and their habitats. Also eliminated were policies to map sensitive species habitat and maintain an inventory of listed rare and endangered species.¹⁵⁰

The deep schism between the County planning staff and the Planning Commission became quite apparent when the staff issued its comments on these changes. For example, in response to the change in the definition of the Rural Residential designation, the staff report asserted:

This is significant from many perspectives...These rural areas need to be devoid of as many conflicts as possible to enhance timber and agricultural pursuits. The rural areas are also constrained by wildland fire hazards, inaccessibility, and much lower service levels. Doubling the population potential will create encroachment on resource lands and result in greater demands for road improvements and other services.¹⁵¹

In response to the elimination of river and stream setback requirements, the staff report complained that “most (if not all) counties and cities provide reasonable setbacks as a means to manage important water resource areas...The standards in the [second administrative draft] reflect those routinely used.”¹⁵²

* In the version of the plan ultimately adopted in 1996, the definition of “important natural resources” included “watershed, lakes and ponds, river corridors, grazing lands,” but not habitat or wetlands (see 1996 General Plan, policy 2.2.1.2).

† By the time the plan reached its final form, a mandatory open space set-aside of 30 percent had been re-instituted (see 1996 General Plan Policy 2.2.3.1).

Where the professional planners saw a need for specific restrictions and resource protections, the Planning Commission favored a deference to property rights, along with related goals such as “less government” and “less costs.”¹⁵³ The Commission asserted that its version provided greater flexibility: “most ‘wills’ and ‘shalls’ belong at the ordinance level where they can be changed by Board action rather than trigger a costly and time consuming general plan change.”¹⁵⁴

“That’s why they call it a *general* plan,” Osborn notes. “It should be a general land use document, not a restrictive covenant but something that gives you guidelines.”¹⁵⁵ He acknowledges the influence of property rights issues, particularly in regard to the change of the natural resource designation (“a majority of the commission felt that really infringed on the rights of private enjoyment of property, and certainly restricted development potential for huge amounts of the county.”) But in general, Osborn says, it is difficult to separate the property rights concerns from the broader concerns about economic development: “You can’t have one without the other,” he notes.

However, Osborn felt that the overall tenor of the plan was so restrictive that it could open the county to takings lawsuits. In fact, to demonstrate this point, he himself filed a \$5 million takings claim against the county over a development proposal on a 320-acre parcel he owned, asserting that intermittent stream setbacks and other restrictions the county imposed were unreasonable. “The process was running amuck, and there could be a real cost to the county. Do you [the county] have enough money to pay for all this land that you’re taking? I filed the claim simply to raise the issue as a topic of discussion.”

The Planning Commission Provides Relief for Individual Landowners

Although a number of policies were made less restrictive in Commission’s revision of the General Plan, Commissioners remained concerned about the hundreds of property owners whose land would still be adversely affected by General Plan land use designations. The Commission’s report noted that “to restrict growth in the rural areas by decreasing land use allowable densities has the potential to down zone a person’s property and destroy lifelong dreams.”¹⁵⁶

After revising the plan the Commission recommended creating a process for hearing individual appeals on land use designations. Several hundred written appeals of land use designations had already been received by the County, but no process for evaluating them yet existed. Now the Commission recommended that the Supervisors authorize them to review the requests in a public forum.¹⁵⁷

The Commissioners were somewhat ambiguous as to whether a regulation-induced loss of property value could by itself be a sufficient justification for appealing a land use designation:

After reviewing staff’s land use maps, hundreds of property owners responded by expressing their concerns that county government will be taking away their constitutional property rights and the dreams and expectations they had when they

purchased their land...Very few of the property owners will argue that they have an unrestricted right and guarantee that they can divide their property. They do however, feel very strongly about retaining the potential use the land had when they purchased it and the faith they had in the future of El Dorado County by paying taxes on a given value and, in some cases, improving the land over a period of years.ⁱ

In 1995 the Planning Commission ended up hearing site-specific requests on over 900 parcels from 442 individual property owners. By this time the 3-2 split on the Commission had widened to a 4-1 split, because in 1994 elections an environmentalist supervisor, Bill Center, was ousted by Walt Shultz, who had criticized Center for hindering appropriate development projects and hurting the County's business climate.ⁱⁱ

Many of these requests for changed land use designations came from the private owners of small parcels, some of them older residents who wanted to subdivide to provide for their retirement or to provide homes for their children. Others were large corporate landholders like developers or lumber companies. The Planning Department informed applicants that each request would be evaluated in terms of whether it was consistent with the proposed General Plan's land use map, goals, objectives and policies.ⁱⁱⁱ

In the end, the Planning Commission granted changes resulting in increased allowable density or intensity of land use for 133 parcels totaling about 10,000 acres.^{iv} The commission did not state reasons for upholding or denying individual requests, but merely stated that it would evaluate requests in terms of their consistency with the proposed General Plan's land use map, goals, objectives and policies.^v While some applicants had plans to develop these parcels, others appealed the designations on principle, or in order to preserve their options in the future. Jim McKeehan, a planning commissioner who replaced Ray Griffiths after the 1994 supervisorial elections, says that the landowners making the requests "felt like they were being taken advantage of by people trying to slow down growth...It took a little pressure off of property owners. Finally someone was paying attention to them." However, while "some people did come in ranting and raving about property rights, we tried to look at it realistically, do a realistic planning job." He says the dominant factors in evaluating them were things like the availability of water, terrain conditions, and roads.^{vi}

A Plan is Approved, But the Conflicts Continue

The Board of Supervisors approved the General Plan in 1996. It had little choice, having used up three deadline extensions from the State's Office of Planning and Research, which oversees the modification of local general plans.¹ The battles between conflicting visions of the county's future continue unabated. Recently, much of the heat has surrounded the issue of traffic. Disputes about the General Plan's circulation element led to the passage in 1998 of Measure Y, a controversial ballot initiative that amended the General Plan to require new development to pay for 100 percent of the impacts on county roads caused by new development.^{vii} At the same time, two recent growth control

¹ Normally only two extensions are allowed; the third required a special act of the State Legislature.

initiatives backed by slow-growth advocates, Measures A and K, were defeated by voters in 1998 and 1996.¹⁶⁵

These debates are political but also cultural. Ideas about planning that are routinely accepted in other parts of the state still have the ability to shock and offend many in El Dorado County. Deputy Counsel Knapp recalls sitting next to an El Dorado County planning commissioner at a statewide conference of planning officials where the guest speaker was a growth control advocate from the Bay Area's Greenbelt Alliance. "People were asking him questions about how they could get urban growth boundaries passed. This planning commissioner was shifting around and getting more and more agitated. Finally he turned to me and said, 'I can't believe they're asking him questions! Why aren't they tarring and feathering him?'"

Although some County officials find the values of the environmentalists and slow-growth advocates to be alien, in their desire to protect property rights and promote growth, these officials not infrequently find themselves running afoul of state and federal mandates. Many of the County's officials complain bitterly about rare and endangered species requirements imposed by the California Department of Fish and Game and the U.S. Fish and Wildlife Service. "I just don't see any end to it. They put more and more demands on us," Planning Commissioner Doug Noble said last year about state and federal pressure to create a new rare plant preserve.¹⁶⁶

"The national environmental organizations' agenda usurps the local ability to do land use planning," says former Supervisor Walt Shultz, whose district contained the contested preserve.¹⁶⁷ He expresses frustration that forces outside of the County's control made it difficult to pursue the Board's goals. Shultz recalls, "People would come into my office in tears about this. I'd say, you had investment backed expectations, but there are people in high places who don't want you to benefit from those investments. Well, you say, that's unconstitutional. But who cares what that old dried up document under glass in Washington says?"¹⁶⁸

Shortly after the General Plan was adopted, a coalition of local environmental groups joined with the Earthjustice Legal Defense Fund* to sue the county on the grounds that the 1996 General Plan's environmental impact report violated the California Environmental Quality Act (CEQA), the Planning and Zoning Law, and the Public Trust Doctrine. In February 1999, a Sacramento Superior Court judge ruled the Plan invalid. As it turns out, the site-specific requests discussed earlier were an Achilles' heel for the plan. Having been adopted in 1995, so close to the deadline for the plan's completion, they were not taken into account in the Plan's Environmental Impact Report. This omission was one of the reasons the judge invalidated the plan as being in violation of CEQA.¹⁶⁹

Aside from the CEQA challenge, the judge ruled that the policies of the plan were not in violation of the law. Nevertheless, it remains to be seen whether the Environmental Impact Report can be fixed without yet another overhaul of the General Plan. Because of term limits, El Dorado County will have three new County Supervisors by the year 2000.

* Formerly known as the Sierra Club Legal Defense Fund.

The debates leading up to the 1996 General Plan may have to be revisited, with very uncertain consequences.

Case Study #5: Regional Bicycle Path Link in West Sacramento

The bike route from Davis to West Sacramento runs alongside the Interstate 80 freeway,



Photo: Current location where the bike path joins West Capitol Avenue.

crosses the Yolo Causeway (a wide bridge across a flood control channel for the Sacramento River) and deposits the bicyclists at the westernmost end of West Capitol Avenue in West Sacramento. Eastbound riders then find themselves on the wrong side of the street in front of a busy freeway onramp. They must make a risky illegal crossing or else ride

for several hundred feet on the wrong side of the street until they reach a traffic signal. Both Caltrans and the city would like to realign this path at the West Sacramento end for safety reasons. Although the City of West Sacramento considered exacting the necessary right-of-way from the developer of a nearby truck stop, it has decided instead to pursue a purchase because of the possibility such an exaction could be construed as a taking.

The question of the bike path arose when Caltrans and the city were developing a plan to re-engineer the entire freeway interchange. The freeway onramp near the path is a particularly bad spot for bicycles, but it poses problems for cars and trucks as well. It is where West Capitol and Enterprise Boulevard feed into Interstate 80. This part of town is heavily used by freight truckers, and this interchange has such heavy traffic that it operates at level of service “F” during peak hours.¹⁷⁰

Realigning the bike path is just one small part of the larger I-80 interchange project. And that project is just part of the city’s plans for West Capitol Avenue. This street is the city’s central economic corridor, but the business climate here has never quite recovered from the blow it suffered in the 1950s when West Capitol was bypassed by the interstate highway.¹⁷¹ Nevertheless, in recent years, West Sacramento has had a good deal of success in attracting development and economic growth and has made strides to shed its image as Sacramento’s poor relation. One of the city’s priorities in the ongoing effort to burnish its image is “cleaning up” West Capitol Avenue. It is the type of street where

fast food outlets, gas stations, and light industrial uses rub elbows with mobile home parks and aging motels, a thoroughfare that is home to much commerce but also a fair share of blight and crime. The city hopes that it will one day be a zone of prime residential and retail space and the address of a future city hall.¹⁷²

Thus, it would be an exaggeration to say that the configuration of this particular bike path is one of the city's top concerns. Nevertheless, as bike paths go, this is an important one. According to the Sacramento Area Council of Governments, the Sacramento metropolitan area arguably leads the nation in the rate of bicycle usage for transportation to work.* The West Capitol Avenue link completes a continuous regional bike trail system stretching 50 miles, including the popular American River Parkway from Old Town Sacramento to Folsom Lake at the base of the Sierra Foothills. The \$60,000 grant from Caltrans for the West Sacramento segment of the trail reportedly constituted 20% of Caltrans' budget for such projects in 1995.¹⁷³ West Sacramento City officials embraced the opportunity to connect West Capitol Avenue to this regional trail. In 1995, City Councilman Roland Hensley called it an "opportunity to take a major step to move ahead as a premier city."¹⁷⁴

But traffic problems are still a much higher priority for the city than facilitating bicycle travel, and the West Capitol Ave-Enterprise Boulevard freeway interchange is one of the city's major public works priorities. In 1997, the city approved a \$10 million plan. The westbound I-80 offramp will be relocated, a westbound loop onramp will be constructed, as well as an eastbound diagonal onramp from Enterprise.¹⁷⁵

Unfortunately, the interchange improvements would make the bike path even less safe than it already is. As Caltrans has noted, "eastbound bicycles currently cross diagonally through the "T" intersection at West Capitol-Enterprise Boulevard. Alternatively, bicycles travel on the wrong side of West Capitol Avenue eastbound until an opening develops, then they cross over to the correct side of the road. With the raised median proposed for the interchange improvements, the eastbound bicycle movements would not be possible."¹⁷⁶ In addition, the shoulder width on both sides of West Capitol would be reduced by almost half. "We'd get people riding on the sidewalk, and that's against the law," notes Toby Wong of the city's engineering division.¹⁷⁷

Accordingly, Caltrans has proposed as part of the interchange project that the outlet of the bicycle path onto West Capitol Avenue be diverted. The modified path would run behind the nearby Exxon service station and then cut back to join West Capitol Avenue at a location several hundred feet to the east of the original outlet. There, bicycles could reach a signal to cross the thoroughfare without riding in the wrong direction or crossing near the freeway onramp. The re-routed path would run partly along a levee easement owned by the local Reclamation District, but it would also require the acquisition of a right-of-way owned by the Exxon station, since the last segment would run along the north and east side of that property.

The main obstacle to re-routing the path would be obtaining the right-of-way from the owners of the Exxon station. West Sacramento's 1991 Bicycle & Pedestrian Path Master

*In 1995 the City of West Sacramento tallied over 100 cyclists per day making the commute from Davis.

Plan calls for the city to “obtain easements for bicycle and pedestrian paths from new developments, as needed, and require all new developments to share implementation costs” of the path system.¹⁷⁸

The likely occasion for such an exaction arose after Exxon station was purchased by Epoch corporation of Olympia, Washington in 1997. Epoch soon applied to the city for a lot line adjustment and a conditional use permit to redevelop its 4.9-acre parcel as an “Exxon Travel Center.” The expanded Exxon station would have separate fueling areas for autos and trucks, truck scales, and parking for 49 trucks. A new 6,777 square-foot building would contain a convenience store, three drive-through fast food vendors, a video arcade, and a laundry/shower facility for long-haul truckers.¹⁷⁹

In March 1998, Caltrans reviewed the conditions of approval for the Exxon project’s mitigated negative declaration. Caltrans informed the City that it would not approve the project unless the city secured the easement for the bicycle path. This requirement was outlined in a letter to the City: “The City shall obtain an easement on the east side of the proposed project and elsewhere where needed, pursue funding for the realignment design, and construct the bike trail in the vicinity of the Exxon Travel Center as proposed in the Project Report so as to ensure a continuous bike trail.”¹⁸⁰

Caltrans has the power to impose such a requirement, in part because the planned \$10 million interchange project will encroach on Caltrans right-of-ways and cannot proceed without Caltrans approval. “‘Shall’ is pretty strong language. It’s a requirement,” notes Ken Champion of Caltrans’ Office of Transportation Planning. “Caltrans as a general rule likes to have a buffer between bike lanes and traffic.”¹⁸¹

According to city planner Harry Gibson,^{*} in the absence of the various takings precedents, the city might have considered exacting the easement as a condition of approval for the Exxon station development project. As it was, he considered and quickly rejected this idea. He didn’t think it necessary to consult the city attorney. “It was a pretty straightforward call, especially in light of the Oregon [*Dolan*] case.” Gibson felt that a nexus was lacking, since the project “was not going to generate any bike traffic.”¹⁸²

As noted earlier, West Sacramento’s 1991 Bicycle & Pedestrian Path Master Plan calls for the city to obtain easements for bicycle and pedestrian paths from new developments and require all new developments to share implementation costs of the path system. Although this provision was drafted post-*Nollan*, it does not seem to have taken into account the need to establish a nexus. The *Dolan* decision, which came three years later, makes the problem even more acute, since the *Dolan* ruling explicitly related to a bicycle path exaction, and specifically faulted the defendant for failing to establish that a bicycle path exaction would offset additional trips generated by the business. Perhaps the *Dolan* requirements could have been met here, but it would have been difficult to argue that merely moving the bike path would offset traffic generated by the truck stop. An argument might have been made that the relocation of the bike path would mitigate safety problems created by the expansion of the Exxon station. In fact, the city did note that the

^{*} Now retired.

project could generate “additional vehicular movement and may increase traffic hazards to vehicles, bicyclists or pedestrians.” However, the city planners decided that this impact could be adequately mitigated by a design change that would reduce the percentage of street frontage devoted to driveways.¹⁸³

In April, the Planning Commission approved the Conditional Use Permit for the Exxon Travel Center. The staff report for that hearing stated:

This project will be expected to contribute approximately \$60,260 dollars in traffic impact fees at the time of construction. Staff believes that the interchange project, and the payment of traffic impact fees, is the proper mitigation required for the proposed project. *The other items requested by Caltrans, including the completion of the bike trail, are important, but not the responsibility of this project.*¹⁸⁴ [Italics added]

In addition, the project would be paying park impact fees, some of which could be used for bicycle-related improvements.

Instead of exacting the right-of-way, the report stated, the “trail would need to be purchased as an easement by the City...Since the Enterprise interchange improvements are a listed traffic impact fee project, the City could discount the fee in exchange for the easement right. Any discount would have to be on a willing seller, willing buyer basis.” The city is now pursuing negotiations for the purchase of the right-of-way. Although no agreement has been reached yet, the city has estimated that the purchase might cost \$50,000.

Case Study #6: Santa Rosa’s Capital Facilities Fee

In 1997, the City of Santa Rosa adopted a new capital facilities fee ordinance. One of the main reasons for this was the realization that the City’s existing impact fee program left it vulnerable to a takings lawsuit. Although one might tend to think of the takings rulings as constraining a city’s powers, the effort to bring Santa Rosa into compliance has actually led to a significant *increase* in the amount of fees it collects from developers. This reflects the fact that, in general, cities subsidize much of the infrastructure required for development. In the process of creating a tighter analytical connection between the fees and the nature and impact of development projects, the City of Santa Rosa was able to justify fee increases for certain types of infrastructure. In general, the real constraint on the size of Santa Rosa’s impact fees has not been the takings rulings or AB 1600, but instead the economic question of how much developers can be charged before the fees begin to stifle economic growth.

Complying With Nollan, Dolan and AB 1600

Chuck Regalia, the City’s Deputy Director of Community Development, describes the original public facilities improvement fee as “a negotiated fee with the building industry, done before nexus requirements. There was no study done to support it. As time went by, I was concerned that it didn’t have a good basis.”¹⁸⁵

“The city attorney, the city manager and I talked,” Regalia says. “I read AB 1600 myself and it became obvious it wasn’t appropriate. We weren’t making any of the findings. There was no science to it at all.” This situation created significant risks for the City. “As time went by, I was concerned that we didn’t have a good basis for collecting the fee. Having this [new] fee gives everyone more peace of mind that it will stand up to legal challenge.”

The technical studies behind the creation of the new Capital Facilities Fee (CFF) were done by a Berkeley consulting company, Economic & Planning Systems, a firm that had already designed fees for the city’s southwest and southeast area plans.^{*} In preparing the findings for the CFF, the consultants noted that the old citywide fee structure was “not backed by a sufficient level of technical analysis (documenting nexus between growth and the items funded). At the time of its adoption, the current legal standards established in statute (Government Code Section 66000) and case law (e.g. Nollan and Dolan) did not exist. It is essential that the new CFF be brought into conformance with these standards.”¹⁸⁶

The City’s Public Works Department estimated that public infrastructure improvements required to serve the population as the city grew to buildout would cost about \$181.3 million.^{187†} However, a portion of the demand for this infrastructure would be due to traffic and population created by existing development. The consultants estimated that new development would contribute a share of the demand representing \$83.1 million of the costs, so this is the amount targeted to be raised by the new fee. Most of the money raised by the new Capital Facilities Fee is destined for transportation infrastructure. Thirty-three percent will go toward local traffic improvements and signals. Fifty-six percent will be spent on freeway interchanges. Five percent will go toward bike paths, another 5% toward storm drainage.¹⁸⁸

Under Government Code Section 66000, findings for impact fees must meet five requirements:

- 1) Identify the purpose of the fee;
- 2) Identify the use to which the fee is to be put (e.g. what public facilities are to be financed);
- 3) Determine how there is a “reasonable relationship” between the fee’s use and the type of development project on which the fee is imposed;
- 4) Determine how there is a reasonable relationship between the *need* for the public facility and the type of development project on which the fee is imposed;
- 5) Determine how there is a “reasonable relationship” between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.¹⁸⁹

^{*} According to Regalia, the City paid about \$50,000 to the consultant to develop the CFF.

[†] According to the consultant’s report, as of 1997 there was enough land within the city’s Urban Growth Limit to support about 22,000 new dwelling units and 11.9 million additional square feet of non-residential building space. At the time of the fee study, the City had about 126,600 residents and 88,200 employees. The new development to buildout would add about 59,800 residents and 26,900 new jobs.

Items (3) and (4) above can be viewed as corresponding to the *Nollan* “nexus” requirement, while (5) corresponds to the *Dolan* “rough proportionality” requirement.

The City’s consultant prepared detailed findings intended to meet these requirements.¹⁹⁰ A good portion of the findings are fairly simple, *pro forma* statements. Consider, for example, the findings relating to roadway improvements. Under “Purpose” (corresponding to item 1 above), the nexus statement merely says, “CFF will help maintain adequate levels of service on public roads throughout the county.” Under “Use of Fee” (item 2), the findings state that the fee revenue will be used to fund the widening of local roads, new freeway interchanges, other regional road improvements, the reconstruction of local roads and traffic signals.” The reader is then referred to a list of projects in an appendix.”¹⁹¹

The most important and also the most demanding requirement in the preparation of these findings was the need to address “rough proportionality” – that is, how the amount of the fees are calculated and allocated to individual developers. The \$83,100,000 is apportioned out to individual developments as fees paid on a per-unit basis (per unit of new housing, per square foot of commercial development, etc.) The underlying approach is always the same: first, estimate the total demand for infrastructure and its cost as anticipated under the general plan’s buildout assumptions. Then, estimate the amount of infrastructure demand each type of land use creates on a per-unit basis, and assign a fee based on a calculation of the share of total demand that will be created by each new project.

However, there are distinct methodologies for calculating contributions for each type of infrastructure (transportation, bicycle paths, and storm drainage).

Transportation: The CFF will fund \$75.5 million in transportation improvements. The costs are distributed to developers depending on the type of land use involved and the amount of traffic that land use type is expected to create. For example, it was estimated that future growth would bring an additional 2,178,000 square feet of office construction to the city. The consultant’s trip generation models project an additional 22,886 “trips” will be generated by this development. Thus, office development represents about 6.2% of the total “trips” that will be generated by new development. The traffic infrastructure cost attributable to office construction will be 6.2% of \$75.5 million or \$4.7 million. Since there will be 2,178,000 additional square feet of office space, each square foot will be charged \$2.33 in fees.¹⁹²

The estimation of trip generation rates is a complex procedure. Traffic models are employed to distinguish trips emanating from within the city from those emanating outside the city (citing AB 1600, the consultants noted that the fee cannot be used to support regional traffic demand).¹⁹³ In addition, assumptions are made to account for “pass-by” trips (those trips that combine more than one destination).

Economic considerations were also factored in. A percentage of retail demand for roadways was allocated to residential uses “to ensure that the actual retail fees do not render retail development unfeasible.” This was justified in part on the assumption that

residential growth creates a need for retail development, and that retail space built close to residences “reduces traffic congestion and cross-town trips.”¹⁹⁴

One thing that is immediately apparent is that the nexus/rough proportionality findings and methodology are much more elaborate for transportation improvements than for bicycle or drainage improvements. This is in part because transportation accounts for the lion’s share of the fees (about 89%). This is therefore the aspect of the fees that needs to be most carefully justified. As Joanne Brion, one of the consultants who worked on the CFF notes, “Traffic is the biggest ticket item, and the one that is going to be most controversial.”¹⁹⁵ As for the comparative lack of a similar level of justification for the allocation of fees to bicycle paths, Brion doesn’t see it as a problem. “We don’t have models that forecast bike use by land use. You could challenge it but the courts would probably side with the city. What’s important is that a reasonable methodology is used. There needs to be a relationship between the method and the actual type of improvement and how demand is generated. It doesn’t have to be elaborate.”¹⁹⁶

Bicycle Paths: in contrast to the traffic and road improvements, the city does not try to directly estimate the demand on bicycle paths caused by development, but instead uses population growth as a surrogate for such demand. The first assumption is that since 30% of the total population at buildout will be from new development, 30% of the cost of the proposed bike path system, or \$3.5 million, should be financed by the fee.¹⁹⁷ The CFF allocates these costs based on estimates of how much population each land use type will add to the city. For example, construction of low density housing is projected to contribute 31,360 to the total projected population increase of 73,290, or 42.8% of the population increase. Low density residential will thus bear 42.8% of the \$3.5 million in bicycle path fees, or \$1.5 million. Since there will be 11,200 new units of this type of housing, each unit will pay \$133 per housing unit in fees.¹⁹⁸

Storm Drainage: the city estimated that storm drainage improvements attributable to new development would cost about \$4.1 million. Allotment of this total to individual developers is based on the use of numerical “runoff factors” that relate the type of land use to the amount of runoff that will be created. For example, calculations based on runoff factors and land areas planned for industry result in an estimate that industrial development will contribute 15.8% of the added runoff. Industrial development will thus pay for 15.8% of the \$4.1 million, or \$651,884 of the costs. This comes out to 12 cents per square foot.¹⁹⁹

How Much to Charge? An Economic Policy Decision

Economics played a significant role in shaping the fee. In the words of the Walter Keiser, the city’s consultant, the CFF was designed to help the city strike a better balance between “what builders should pay as their fair share and what they can afford and still be able to build.”²⁰⁰

In comparison to the old fee program, the CFF represented an average increase of about \$1,100 per residential housing unit and \$1.43 per square foot of building space.²⁰¹ While a unified citywide fee would allow fee revenues to increase, it also allowed fees to be lowered in the city’s southwest and southeast quadrants in order to the construction of

less-expensive housing. The costs of retail-related infrastructure were also redistributed to provide a more balanced pattern of development.²⁰² Some fee relief was also provided for commercial development by shifting part of that burden onto the city (to be funded out of the city's general fund). It was hoped that increased development would ultimately more than make up for that in higher sales tax revenues.²⁰³

Although for the city's planning and legal staff the takings rulings were a significant factor in changing the approach to developer's fees, elected officials and the public were probably more concerned with the economic impacts of the fees.²⁰⁴ Prior to the adoption of the CFF, the mayor had worried that "we are pricing ourselves into a situation where we will get nothing" in terms of new development.²⁰⁵ The City's consultant noted that setting fees appropriately "is a very tender balance, a tough one to strike."²⁰⁶

The consultant informed the City that the industry standard of cost burden for residential uses is 15 percent of the market value or less. For commercial uses the industry standard is between five and ten percent of market value. "If the cost to develop greatly exceeds that of nearby competitive areas, development may shift to those lower cost areas."²⁰⁷ It should be noted that the CFF fees are only a portion of the fees that a developer must pay. A typical single family house might pay a CFF fee of \$2,547. But additional fees, including sewer hookup, water hookup, and school impact fees, could bring the total to as much as \$26,000.²⁰⁸

In terms of the amount of fee revenues the city can expect to collect, AB 1600 has not acted as a constraint, and seems to have permitted the City some room to maneuver in terms of tailoring fees to policy goals. However, there are some limits to this flexibility. One problem is that local improvements often serve both local and regional needs. The consultant who developed the CFF noted that "Resolving the funding requirements for region-serving streets and highway improvements will not be possible with the new CFF program or other purely local funding sources. The costs are beyond the local capacity to pay and even if such capacity existed, it would be inequitable, given the regional benefit of such improvements."²⁰⁹ Paying for region-serving improvements will require Santa Rosa to draw on its general fund or else find alternative state, federal, or regional funding sources. The consultant's technical report notes that a number of local governments in California are considering regional impact fees to address this problem.²¹⁰

Financing the upkeep or development of infrastructure that serves existing development also falls outside the capability of impact fees. One example is freeway interchanges. Like the City of Murrieta (discussed in another part of this report), neither Caltrans nor impact fee revenues are likely to pay for all the interchange improvements that Santa Rosa will need.²¹¹

A city that is experiencing growth would be well-advised to develop an AB 1600-compliant fee structure sooner rather than later, in order to give them the flexibility to charge new development as much as the market and economic policy goals will allow. On the other hand, cities that are already close to buildout or are not growing may not benefit from the sort of approach Santa Rosa has taken. In such locales, there may be too few new projects to justify the trouble of developing the fee, and it may be difficult to accumulate enough funds to build anything within the five-year time limit imposed by

AB 1600.²¹² Such cities may be better of negotiating exactions on a project-by-project basis.²¹³

The adoption of the CFF did not incite much controversy in Santa Rosa. A spokesman for the Homebuilders Association of Northern California expressed support for the “more global approach” of having development fees applied on a consistent citywide basis. At the same time, a local environmental attorney with ties to the Sierra Club applauded the City’s efforts to encourage neighborhood-oriented retail.²¹⁴

For the City, there seems to be little in the way of a downside to the adoption of the CFF. AB 1600 prescribes some detailed accounting requirements and administrative procedures that will add to the staff workload (although 1% of the fees are earmarked for administration).²¹⁵ Deputy Community Development Director Regalia says that the new approach “will probably stretch out the time it takes to make improvements,” because the City is required to spend the fees on such a long list of projects in order to justify the level of the fees exacted, which spreads the fees more thinly.²¹⁶

Developers will likely continue to complain about high development fees in Santa Rosa. Regalia notes that although some individual developers objected to the old fee structure, “for the most part developers would probably prefer the old system because they paid a lot less. We are getting four to five times more than before, because it [the fee] relates to the actual cost of improvements we wanted to support.”²¹⁷ Ultimately the market and competition with neighboring jurisdictions will determine whether Santa Rosa has struck the appropriate balance.

PART IV. DISCUSSION

The goal of this study has been to investigate whether the takings rulings have had an impact on land use planning in California, and if so, to say something about what kind of effect it has had. We are now in a better position to begin answering our original questions:

- *Visibility of takings issues:* Are takings issues a prominent feature of land use issues today? To what degree have local governments taken notice of the Supreme Court rulings? Are the takings rulings creating pressure on local governments to change their practices, decisions or policies?
- *Impact of takings on land use planning and regulation:* Are takings issues having an influence on how local governments plan and regulate land use? Have the takings rulings made local governments more cautious? Have they created a chilling effect on regulation? How have local governments adapted to the changing legal climate?
- *Impact on the use of fees and exactions:* Have the takings rulings had an impact on how local governments use exactions? Have the rulings affected their ability to use exactions as a tool for financing public infrastructure and services?
- What are the *policy implications* of these changes?

Overall, there are several key conclusions that can be drawn from the results presented in this study:

- Takings is a high-profile issue in many communities. Local governments and citizens are aware of the takings cases, and takings objections, litigation threats, and even lawsuits have become a common aspect of land use planning discussions throughout the state.
- Takings is having an impact. Some cities and counties react by changing decisions or policies. A larger number adapt with procedural changes.
- The takings rulings can impose constraints on the ability to finance services and infrastructure through fees and exactions on new development. This can put additional strains on local budgets, or make it more difficult to manage land use and accommodate growth.
- Takings precedents have fostered uncertainty and hesitancy among some local governments about the permissible use of fees and exactions for a variety of purposes ranging from traditional infrastructure to amenities like trails and open space.

- Takings issues can contribute to controversy and conflict over planning issues. They can also distort planning through the exposure of risk-averse local governments to litigation.
- While the takings rulings raise problems and challenges for local governments, they sometimes have the beneficial effect of encouraging planning to become more equitable, systematic and forward-looking.

In the discussion that follows, I will draw on both the survey results and the case studies. In addition, I conducted numerous interviews with survey respondents and others, and will draw upon these as well.

Visibility of Takings Issues

A High-Profile Subject

Takings issues clearly have a high visibility among planners, as reflected in the numbers who report being very familiar with takings precedents (Figure 1). Over 90% of survey respondents were at least somewhat familiar with the *First English*, *Nolan* and *Dolan* decisions. As we have seen, many cities and counties regularly confront takings objections at nearly every stage of the planning process. Takings litigation threats are also a fairly routine occurrence in many cities and counties (Figures 5, 6).

In general, counties more than cities seem to encounter opposition and controversy regarding takings issues. For example, 34% of cities reported takings objections occurring at least once a year, as compared to 64% of counties (Figure 2). Twenty-two percent of cities report litigation threats occurring at least once a year, while the figure is 48% among counties. Counties are also more likely than cities to report that takings objections and litigation threats have been increasing in recent years (Figures 3, 4, 6). Why these differences? This is an unanswered question. It might have to do with the fact that counties are more likely than cities to be in control of large areas of undeveloped land, leading to conflicts over sprawl, open space, habitat, agricultural preservation, and so forth. This seems to be part of what was going on in the El Dorado County case study. Or it may have to do with the differing political structures of counties as compared to cities. County governments often represent constituents that are widely dispersed both geographically and on the political spectrum. We saw this dynamic at work in the case of El Dorado County's general plan update, and also in the Santa Cruz County "Trails Master Plan" case study.

Local Governments Vulnerable to Takings Litigation

Although takings objections and litigation threats are often dismissed as mere rhetoric or "hot air," there is no doubt that local governments must often take the threat of takings litigation very seriously. As we have seen, a third of cities (33%) and nearly half of counties (46%) report that they have been the target of a takings lawsuit.

Furthermore, the survey shows that it is very rare for local governments to have insurance coverage for the costs of defending, settling, or paying damages in such lawsuits (Figure 7). Given the prevalence of litigation and litigation threats, this situation could pose significant risks for local governments.

From conversations with insurance executives, city attorneys, and local government risk managers, it appears that in fact nearly all commercial insurance policies available to cities and counties contain a standard exclusion that omits takings claims from coverage.²¹⁸ For example, a policy that covers over 80 cities in a joint powers authority in Southern California contains an exclusion that reads: “This agreement does not apply to . . . Claims arising out of or in connection with land use regulation, land use planning, the principles of eminent domain, condemnation proceedings or inverse condemnation by whatever name called...”²¹⁹ Notes one insurance industry executive, “The reason why inverse condemnation is so hard to insure is because its claim severity is very volatile and unpredictable.”²²⁰

Nevertheless, it does appear that in at least *some* cases cities can obtain a degree of coverage for takings-related liability. Under the joint powers authority called BICEP (Big Independent Cities Excess Pool), member cities self-insure up to a \$1 million retention. For claims above \$1 million, the pool has negotiated coverage through the Berkley Group of Insurers which covers inverse condemnation claims.²²¹ This arrangement appears to be quite rare in California, if not unique. BICEP is comprised of the cities of San Bernardino, Oxnard, Pomona, Huntington Beach and Santa Ana.

Impact of Takings Issues on Land Use Planning and Regulation

To what extent have the takings rulings actually influenced regulatory decisions, policies, and procedures? And what does this influence look like?

Most cities and counties surveyed say that the takings rulings have not caused them to make major changes in their regulation of land use. They have not reduced their use of any types of fees or exactions, and they could not identify policies or decisions that had changed. Nevertheless, the number of cities and counties that *have* changed in response to takings is substantial. A significant minority report reducing their use of some types of fees or exactions, or acknowledge that decisions and policies have been changed by takings issues. It appears that an uncertain and litigious legal climate can sometimes have a strong influence on land use planning.

In addition to changing specific decisions or regulatory policies, the takings rulings have influenced the *process* of land use regulation and planning. They have encouraged planning to become more systematic and methodical, particularly in the area of exactions. In all areas of planning, they have encouraged many local governments to become more cautious and circumspect, and to focus more on the property rights impacts of their actions.

Takings Causes Changed Policies and Decisions

The survey data (Tables 7, 8) indicate that the takings rulings have in fact led to changed regulatory behavior in a sizeable minority of cities and counties (27% of cities and 49% of counties). Again, problems related to takings seem to be more acute at the county level.

The statements by respondents on their survey forms give us a sense of the kinds of changes that are occurring (see Table 6 and Appendix III).

A few typical examples:

- “Granted support for construction of single family residence in area “public” wishes to remain recreation.”
- “Permitted uses in open space zoning.”
- “General plan designated a property for “Habitat Restoration Area;” owner filed lawsuit. Town amended general plan to allow offices to avoid litigation.”
- “Strong sentiment from public to severely restrict development has led to our balancing act – open space preservation vs. taking. We are careful to allow some reasonable use of land.”
- “Regulations re airport safety zone overlay made more flexible.”

In addition, a number of jurisdictions report backing off from certain kinds of fees and exactions because of takings issues. This will be discussed in more detail in a later section.

The Role of Litigation and Litigation Threats

Planning agencies have broad latitude to plan and regulate land use. Although *Nollan* and *Dolan* limit the power to extract fees and exactions, takings law allows considerable leeway for local governments to make decisions that significantly reduce property value (such as down-planning, down-zoning, or denial of subdivision rights).

Nevertheless, fiscally strapped cities and counties often take seriously the possibility of litigation. While many litigation threats are no doubt frivolous, the stakes in land use disputes are potentially very high. Land use decisions and policies can make or break major development plans or adversely affect numerous property owners.

The survey shows that there is a contentious, often litigious climate surrounding property rights issues in the land use arena, and that most local governments have reacted to reduce the risk of lawsuits. As the case studies and other anecdotal evidence suggest, property owners, especially those with legal representation, can sway local governments by raising takings objections or litigation threats. The survey found that many cities and

counties have changed their regulatory behavior in response to takings issues. While these changes are not necessarily directly attributable to litigation threats, the survey found that cities which have been sued or subject to frequent litigation threats are more likely to have changed their regulatory behavior (Figures 8-10).*

Changes in policies or decisions may be the direct result of a lawsuit or the threat of a lawsuit. Or, it may be enough for the property owner to object to the proposed exaction or regulation. Sometimes the regulators simply adjust their actions to fit their perception of the constitutional and legal requirements of their own volition, without being pressured to do so.

An explicit litigation threat may not be necessary to sway a government agency. The takings precedents can give considerable leverage to a citizen or developer with a good attorney, particularly when their claim has some legal plausibility. In the Whaler's Cove case study, we saw that a persistent property owner with a strong advocate and a plausible takings argument was able to sway San Mateo County and the California Coastal Commission regarding public access across her property. This outcome would have been much less likely before the *Nollan* decision. In the case study on the City of Murrieta, it was enough for the developer to call the *Nollan* and *Dolan* precedents to the City's attention when the city tried to require reservation of a right-of-way as a condition of approval for a commercial development.

It must be remembered that a great many respondents reported *not* changing their regulatory behavior, even in jurisdictions that had experienced frequent takings litigation threats or lawsuits. A lawsuit is a very slow and costly process for all litigants. Both planners and developers know that few threats result in actual lawsuits, and planners do not take all such threats seriously. Furthermore, a developer may well hesitate to take action that can make them seem litigious if doing so risks jeopardizing a working relationship with local government: "It's really tough for them to litigate because cities have so many ways to make their lives miserable," notes Walter Keiser, a consultant who specializes in impact fees.²²²

It should also be noted that changes in regulatory behavior often come about simply from an effort to comply with the law, without any external threat, as in our West Sacramento case study, in which the city considered, and then rejected, a proposal to exact a bike trail easement without any outside pressure.

Increased Caution and Circumspection

The influence of the takings rulings cannot always be reduced to its effect on individual decisions or actions of government. One of the main impacts is a fairly pervasive increased cautiousness. Respondents who indicated on the survey that takings had changed their regulatory behavior often had difficulty putting their finger on the precise changes that occurred. As one observer accurately predicted when the *Dolan* decision was handed down in 1994, "while the ruling is not likely to send localities into headlong

* That counties did not show a similar statistical correlation is somewhat anomalous, given how responsive counties are to the takings issues in general.

retreat on land use laws or wholesale review of permit conditions, it does serve notice that the high court is paying attention and that states and localities had better craft their land use laws and permitting conditions with care.”²²³

Such increased care and circumspection are clearly in evidence in the survey results and the case studies. It is seen in the 55% of cities and 89% of counties that reported having changed procedures on findings, or the 63% of cities and 60% of counties that have contracted with consultants to prepare studies on fees and exaction. And it is most evident in the cities and counties that reported changed policies or decisions.

This changed climate is perceptible even when the specific effects are less visible. Land use planning expert William Fulton says he has not seen much change in the substantive practice of land use planning because of takings, but notes that “it has changed the psychology when the planner and the developer are negotiating. It has given the developer more leverage. They [planners] have to mentally do a property rights assessment any time they downzone or alter the ability of the landowner to develop.”²²⁴

Takings Often One Factor Among Several

As the case studies make clear, a takings objection or claim is often one factor among several that influences a decision. Frequently the legal aspects of the debate are inseparable from the political. For example, in El Dorado County, property rights concerns played an important role in the debates over the general plan, but their proponents did not draw a sharp distinction between these and other concerns about policy, economics, and basic fairness.

Frequently property rights issues are bound up with economic questions about how much development and of what kind is good for a community. In a rural county with inadequate development impact fees, the informant attributed the problem in part to property rights issues, and in part to an attitude on the part of elected officials that “we don’t want to burden development.” As another rural respondent noted on his questionnaire, “In slow-growing rural counties where development standards aren’t as “exacting” or severe as in metro areas, fear of litigation over inverse condemnation or takings isn’t a major concern. We welcome development, but don’t get much of it.”

Although takings issues often arise in land use planning decisions, it is important to distinguish between the chilling effect and the normal operation of the political process. If a conservative city council or board of supervisors is elected, that is politics. And if that body, being sympathetic to property rights, takes pains to avoid regulations that impact property values, that is politics too. As I define the term, a chilling effect only occurs if the decision is driven by a desire to avoid litigation risk.

By this definition, the changes to El Dorado County’s general plan did not really represent a chilling effect, since they were in accord with the planning commissioners’ political views. The Santa Cruz County case study was a borderline case. It was largely decided by grassroots political pressure. However, in the Santa Cruz case, the policy changes were made reluctantly, motivated in part by a desire to avoid takings liability, so to some extent a chilling effect was present.

Dan Silver, of Southern California's Endangered Habitats League, argues "Most elected officials in southern California are philosophically opposed to down-zoning. Takings has created a lot of noise and rhetoric but hasn't made that much of a difference on the ground. Where things were bad [for habitat conservation efforts before the takings rulings] they're still bad. Where things were good, they're still good. It depends on the political climate."²²⁵ Anthony LaBouff, county counsel for Placer County, notes that in a conservative county such as his, those who raise takings objections "get a very sympathetic ear" from officials. Regulations are often seen as "part of the problem, not the solution."²²⁶

In general, then, the takings rulings can exert a chilling effect on land use planning. But not every response to property rights claims is a chilling effect: sometimes it is just the political process at work.

Attention to Takings Can Encourage Rationalization of Planning Process

We have noted that takings concerns can make planners more cautious. One outcome of this is that the planning process itself tends to become more systematic. The takings rulings mean that decisions that are made in an ad hoc or improvisatory way will tend to be more vulnerable to legal challenge than those that are carefully formulated as part of a long-range policy. This is true in all aspects of planning, and particularly so with respect to exactions.

As a result, there is a greater need to explicitly justify policies and decisions, and to back up those justifications with evidence and analysis that can withstand judicial scrutiny. As we have seen, many jurisdictions are spending more time and effort on preparing findings. Others have developed new policies, standards or studies in support of fees and exactions.

Recall that a strong majority of planners agree that the *Nollan* and *Dolan* rulings are consistent with good land use planning (Figure 12). Many planners have embraced the need to carefully document nexus and rough proportionality.

The Impact on Fees and Exactions

The impact of the takings rulings on the use of fees and exactions merits special attention. In the aftermath of Proposition 13, exactions have become an increasingly important way for local governments to finance infrastructure and other public goods.

The takings clause imposes important restrictions on the exactions power. As the survey showed, the importance of the *Nollan* and *Dolan* rulings is not lost on local planners. We saw that nearly all planners are at least somewhat familiar with the *Nollan* and *Dolan* precedents (Table 1). Many jurisdictions have encountered takings objections in this context. Thirty-five percent of cities and 58% of counties reported encountering takings objections directed at fees or exactions. These objections were especially common with regard to fees and exactions for roads, but also for open space, wildlife, parks, schools, and public trails, among other things (Table 3).

It is clear that the takings rulings have raised questions about how cities and counties use fees and exactions. How have the cities and counties responded?

Fees and Exactions More Methodical and More Complex

The takings rules have made local governments more cautious in their use of fees and exactions. This has costs and benefits. On the one hand, it means more red tape, more time and more expense for developers and local agencies. On the other hand, it means a process that is more methodical, predictable and transparent.

“You become much more cautious if you don’t have a nexus study, especially where the nexus isn’t clear,” says Dennis Barry, a respondent from Contra Costa County.²²⁷ “It makes you a lot more cautious on ad hoc fees and exactions.” He notes, somewhat ruefully, that this can make planning more of a science and less of an art, expressing some nostalgia for the days when he could practice “the art of public administration, the ability to negotiate with applicants in administering regulations, not the cold hard science of *Nollan* and *Dolan*.”²²⁸

No doubt many planners feel they could do a better job if they were not always constrained in this manner. “This land use litigation has pushed us into more paperwork and more time spent documenting the impact. We’re doing a lot of number crunching and sometimes lose a little perspective on what we’re trying to do for the community,” says one.²²⁹ Dennis Barry of the County of Contra Costa probably speaks for many planners when he sums up his ambivalence about the *Nollan/Dolan* legal regime: “It’s possible to admire a thing and dread it at the same time.”²³⁰

While planners have less maneuvering room with fees and exactions, this can be of benefit to developers. One of the biggest problems developers face is the risk and uncertainty involved with investing large amounts of capital in a long-term development project without a guaranteed outcome. There is greater predictability and transparency for a developer working in a community that takes care to establish nexus in local policies and ordinances and has a systematic approach to calculating proportional contributions: “If you have a system requiring findings that require developers to do onsite improvements, and a system to pay into a pool that works toward developing community-wide projects, that’s a better way to go. If the structure is there, they [developers] will abide by it,” says Joe Heckel, Community Development Director for the City of Cloverdale.

Yet the “cold hard science” of *Nollan* and *Dolan* comes at a cost. Shortly after the *Dolan* decision, one observer quipped that it should be described it as the “Local Planners Full Employment Act” because of the added burden it would place on localities to “do their homework.”²³¹ (Although it might have been more accurate to describe it as the “consultant’s full employment act” since private consultants prepare so many of the nexus and impact fee studies). Steve McAdam, Deputy Director of the San Francisco Bay Conservation and Development Commission, notes that the increased focus on takings means “It takes more time to review findings. It has increased the workload and slowed processing times.”²³² Heckel, the Community Development Director from

Cloverdale, notes, “Now instead of a couple pages, the findings might be 30 pages.”²³³ “What *Nollan* and *Dolan* have done is increase costs for development through enhanced environmental review,” says a traffic engineer from a coastal Southern California city. “It looks like a victory for property rights, but when government reacts it doesn’t look so great.” This is especially true of larger projects. Says Heckel, “You’re talking about hours of staff time, but we needed to protect ourselves from specious litigation.”

Overall, has the takings issue had a beneficial or a harmful effect on how land use planning is practiced? The survey elicited opinions on this subject from professional planners. As a group, they were ambivalent about it. A clear majority felt that the principles established by the *Nollan* and *Dolan* precedents represent good land use planning practice (Figure 12). Yet many respondents (46% of cities and 39% of counties) agreed that the takings rulings helped to create a legal climate that reduces their ability to manage land development in the public interest (Figure 13). It would appear that planners and property rights advocates share common ground in endorsing some of the takings principles. However, many planners apparently find the contention and litigation surrounding takings issues can be detrimental to good planning.

Some Types of Fees, Exactions Avoided

A minority of cities and counties (19% and 35%, respectively) report that they reduced their use of certain kinds of fees or exactions because of the takings rulings. The most commonly cited types of fees and exactions affected in this way were those for roads and traffic, along with natural resource amenities such as trails and public access, habitat, open space and parks (see Table 5 and Appendix II).

In general, it is probably likely that the takings rulings have *not* reduced the overall magnitude of fees collected in California. As the Santa Rosa case study showed, a conscientious effort to comply with takings rules can be accompanied by significant *increases* in fees. More likely, the influence of takings is to limit the use of certain types of fees and exactions, or to limit their use in certain situations.

Why have some local governments become more cautious about fees and exactions? There are two sorts of issues that were cited in interviews I conducted.

1) The problem of cumulative impacts

Rough proportionality and nexus rules mean that a given developer can only be required to pay for infrastructure and services in proportion to the needs created by his or her own development project. Yet many infrastructure and public service needs are created by the accumulation of many small development impacts. This issue arises for all sorts of fees and exactions, ranging from fees for traffic improvements to dedications of easements for public trails. Fees and exactions cannot address these needs effectively unless a mechanism is in place for pooling small (proportional) contributions from multiple developers over a long period of time.

In response to the takings rulings, some cities and counties are modifying practices that would unfairly burden a single developer for more than their fair share. For example, the

“last developer in line” cannot be required to shoulder the entire cost of a new freeway interchange necessitated by years of growth in the community. To take another sort of example, a city cannot exact from a developer a right of way or a piece of land simply because the land is needed and the developer conveniently applied for a development approval. These issues arise for all sorts of fees and exactions, ranging from fees for traffic improvements to dedications of easements for public trails.

2) Uncertainty about applying the nexus and rough proportionality standards

There are rigorous and widely accepted methodologies for calculating certain kinds of development impacts. Traffic impact studies are a common example. But when it comes to other sorts of infrastructure and public goods, such as trails or open space, planners may be uncertain what the law permits and what methodologies can be used to establish nexus and quantify development impacts. This uncertainty may help to explain why fees and exactions are often challenged for things like public trails, open space and habitat. Such concerns have also been raised with respect to more traditional items like drainage.

Fees and Exactions for Roads and Traffic Infrastructure

The problem of cumulative impacts often arises in the context of traffic-related exactions (see Table 5 and Appendix II). Over time, many development projects will have individual impacts that, while too small to justify large exactions, over time add up to create significant demands for new infrastructure.

Often at issue is a proposed dedication of land or a right-of-way. The case study on the freeway interchange in Murrieta is a fairly typical example – the developer who owned the land the city and Caltrans needed for an onramp correctly pointed out that his development wasn’t the only one creating the traffic that would use the onramp. To take another example, the City of Cupertino reported becoming more careful about exacting street improvement dedications (such as a right-of-way for a bus duckout), only requiring them for larger developments. “It’s a question of scale. We could require it with a regional shopping center or other larger-scale development, but not with a minor improvement,” says the city’s Community Development Director.²³⁴

The cumulative impacts problem also arises with respect to fees. It is natural tendency to give immediate needs first priority, and by the time infrastructure such as roads becomes overburdened, much of the development in the community may have already occurred. For example, the City of Mountain View recently considered adopting a traffic impact fee that it hoped could pay for the costs of anticipated improvements as the city reached buildout. However, the consultants determined that the vast majority of the needs (which amounted to several hundred million dollars) came from existing development. The city then considered a fee that would make the contribution proportional to the developer’s incremental contribution to the overall traffic problem, but since the city is already near buildout, such contributions would be too small to finance significant improvements.²³⁵

Fees and Exactions for Other Infrastructure

There are other types of standard infrastructure besides road and traffic improvements where the issue of cumulative impacts arises. These include storm drains, lighting improvements, and sidewalks (see Tables 5 and Appendix II).

To cite a couple of specific examples:

- In Lafayette, the city no longer has developers pay for off-site improvements (such as upgrading curbs, gutters, sidewalks, and drainage) not directly tied to the development impacts. Says the city's planning director, "Nollan and Dolan have made the city more reticent except for immediate frontage improvements. People would get up and say, 'You can't make me do that,' and if it was a valid objection, the city attorney wouldn't disagree."
- In the City of Clovis, planners used to require that developers pay to put power lines underground if the lines happened to be adjacent to a property being developed. Over the years they moved away from this practice as they saw the direction the Supreme Court was heading.²³⁶

As with traffic infrastructure, the issue with cumulative impacts is usually that the city or county is accused of disproportionately burdening one developer with the cost of meeting a demand for public goods that has been created by many developments over time.

In addition to the issue of cumulative impacts, some local governments are still unsure about what the law permits and what methodologies are acceptable when it comes to exactions for various kinds of infrastructure. As one city traffic engineer put it, "If I'm going to build a Jack in the Box, I know exactly where to go look up how many trips something like that will generate. But if I want to know how many bicycles go into a Jack in the Box, I have no idea." In general, he says, "Our opinion is that [exactions are] questionable when the dedication is for nontraditional purposes, such as bikeways and public accessways." One planner I talked to stated that sidewalks are tougher to document a nexus for than traffic improvements.²³⁷ Another noted that parks and drainage improvements can be difficult to quantify.²³⁸ The fact that such uncertainties exist doesn't necessarily mean that local governments cannot impose such exactions, but it does indicate that some are hesitant about it.

Fees and Exactions for the Environment, Recreation and Quality of Life

A special set of issues arises when local governments use fees or exactions to finance the kinds of natural resource services or amenities that are increasingly demanded of local governments. These include threatened habitat or endangered species protection, protecting open space or rural character for aesthetic or environmental reasons, and obtaining easements for recreational trails or access to publicly owned natural resources such as the coast. These amenities reflect how the public's conception of local government infrastructure and services has expanded. But when they are provided

through fees or exactions, uncertainties may arise about establishing nexus and rough proportionality.

To some extent the problem here is the same “cumulative impacts” issue discussed earlier. For example:

- The City of Irvine was challenged by a housing developer over a requirement, rooted in the City’s General Plan, that the developer build a hiking and equestrian trail on a city-owned right-of-way bordering a flood control channel. Realizing that the added equestrian traffic from the development might not sufficiently justify exacting the full cost of the trail, the City agreed to require only that the developer provide a freeway undercrossing for the trail.²³⁹
- The California Coastal Commission and the San Francisco Bay Conservation and Development Commission (BCDC) have largely abandoned the practice of imposing public access conditions for smaller developments near in the coastal zone: “You can’t show nexus between a single family home and a public burden sufficient to get a trail. Very few small residential projects along the shoreline now trigger coastal access,” says BCDC’s Steve McAdam.²⁴⁰

This same sort of reasoning appeared in some of the case studies. In the Whaler’s Cove case study, the impact of a small bed and breakfast inn was deemed insufficient to exact a public access easement. In the Santa Cruz County case study, homeowners objected to the idea that an application for a building permit might trigger the exaction of a public trail link. In Murrieta, the developer argued against an exaction for traffic improvements necessitated in part by prior development.

Beyond the “cumulative impacts” problem, natural resource-related exactions can be especially contentious, and are often approached cautiously by local governments. As we saw in Tables 4 and 5, these are often the subject of takings objections and changed policies (see also Appendices III and IV). In many cases, politics probably plays an important role. Such amenities can be controversial, as we saw in the El Dorado and Santa Cruz County case studies. This is particularly true when the community is already polarized over issues such as environmentalism and growth control.

However, there are also legal ambiguities that arise when applying the nexus and rough proportionality standards to natural resources. Natural resource amenities tend to serve community-wide needs and are not as easily linked directly to the impact of a particular development. In communities that are divided on issues such as environmentalism or growth control, these amenities may be inherently prone to controversy. In addition, the courts may tend to scrutinize these kinds of exactions more carefully, on the grounds that they provide benefits rather than mitigate a public harm. While development is certainly related to the public’s need for amenities like trails and open space, there may be uncertainty about connecting such community-wide needs to the impact of a particular project.

In principle, local governments have the authority to mitigate environmental impacts as an exercise of the police power. In addition, the common law “public trust doctrine” confers on the public ownership of fish and wildlife, access to waterways and the coast, and even public rights associated with the preservation of scenic beauty.²⁴¹ Government can impose mitigation requirements when it approves development that impacts these public rights. Nevertheless, such impacts may be hard to quantify or even define with precision.

It becomes harder to construct an airtight nexus with diffuse public benefits. At one end of the scale is a traffic light required at the entrance to a new shopping center. Here the documentation of nexus is fairly straightforward – were it not for the traffic going into the shopping center, no light would be needed. At the other end of the scale would be a development fee imposed on all development to finance acquisition of open space in a city’s “greenbelt.”

To take another example, consider trails. While it may be possible to agree in theory that there is some connection between the need for public trails and the increases in the density or intensity of land use brought about by development, it is harder to say how the nexus should be documented between a particular development and a particular trail exaction. How should rough proportionality be calculated? If a dedication of land is sought, how far can it go? “There’s still a lot of uncertainty in takings law,” noted Santa Cruz County Counsel Dwight Herr. “Even if you have a subdivision and decide that a trail easement is legally appropriate to require for the use by future residents of the subdivision, can you open it to the public as part of a larger trail system? And will the answer depend on the extent to which the future residents would benefit from connection to the other parts of the trail system?”²⁴²

Policies seen by some as mitigating the harms of urbanization can be viewed by others as unfairly burdening a private party with providing a public benefit (as we saw in El Dorado County). As a recent review of takings law noted, the courts tend to scrutinize more carefully regulations seen as “preserving privately owned lands as open space or wildlife habitat for the benefit of the public. Conversely, those instances in which the government acts to abate a nuisance or proscribe nuisance-type activity are the kinds of regulatory actions most likely to survive constitutional attack.”²⁴³

The Problems of Project-Specific Exactions

An area in which takings issues have had a particularly marked impact is in the use of exactions to obtain dedications of land or public improvements on a project-by-project basis (as, for example, in the Murrieta and West Sacramento case studies). It was far more common for respondents to report that they had backed off from a project-specific exaction than it was for them to report a successful challenge to a general fee structure (see Appendix II).

This is not to say that such exactions cannot be made in strict compliance with *Nollan* and *Dolan*. In fact, about a quarter of cities and counties report having conducted project-specific fee or exaction studies for this purpose. But this approach is likely to be cost-effective only for large projects, and as a result such ad hoc exactions probably often

suffer from not having well-documented findings or well-developed support for nexus and proportionality.

In addition, it appears a common tendency in such cases is to scale the exaction not to the impacts of the development but to the intended use for which the public agency desires the land. For example, suppose a city wants to exact a right-of-way for future street widening from the developer of a shopping mall. The city might decide to scale the width of the right-of-way not to the precise impacts of the development, but rather to the anticipated future width of the street.

Project-specific exactions (as opposed to fees) often involve exactions of land, as illustrated in several of our case studies (see also the survey responses in Appendix II). Such exactions may be seen by the courts as going directly to the core values of property ownership: the right of private individuals to physically control and exclude the from their land. According to a recent book on takings law,

“...as the Penn Central Court expressly noted, a taking is far more likely to be found when government physically occupies private property than when it merely regulates private use.

But subsequent cases indicate that as to purely regulatory actions, some government programs are entitled to less deference under the Takings Clause than others. For example, the Court has shown particular skepticism toward government programs that abrogate...the right of private landowners to exclude the public from their property.”²⁴⁴

In addition to being subject to a high level of judicial scrutiny, such exactions seem particularly likely to arouse property-owner objections because, unlike fees, they prohibit the owner from using some of his or her land.

Summing Up the Policy Implications

Fees, Exactions, and Public Finance

Whether or not one thinks of development fees and exactions as a means of financing infrastructure and public services, the takings rulings place additional constraints on their use. This raises anew the question: how should these things be financed?

The takings rulings are an important additional constraint on fees and exactions in an era when exactions are bearing an unreasonably large share of the load of financing public services. Proposition 13 has reduced the ability of local governments to distribute such costs more widely and equitably through taxation. So has Proposition 218, which restricts both taxation and the use of fees and assessments as well. At the same time, local governments have suffered further losses of property tax revenues to the Educational Revenue Augmentation Fund (ERAF). All in all, local governments often find themselves in a bind. The takings rules can tighten the bind by restricting certain avenues they could otherwise use for financing infrastructure and other public goods.

It may not be obvious that the use of fees has been constrained in any way, since many fees (particularly housing impact fees) are now so high. As already noted, impact fees could arguably be higher in many locales were it not for the impact on local economic competitiveness, housing prices and so forth.

Nevertheless, takings rules do constrain fees and exactions. They close off avenues of financing underfunded infrastructure needs in cities and counties. In some cases they close off avenues that perhaps are better closed off, such as the cases where fees or exactions inequitably burden a single developer for the cumulative impacts of many other developments.

In other instances, it is not equity or proportionality that is at issue, but simply uncertainty about the law and an aversion to the risk of legal problems. Where there is uncertainty about the legality of using fees and exactions, jurisdictions may be discouraged from using them in ways perceived as risky. This may discourage some locales from using these tools to provide anything other than the standard sorts of infrastructure (and even there uncertainty and caution sometimes prevails). As a result, takings concerns can narrow the use of exactions as a tool for financing public improvements.

Effective Use of Fees and Exactions in the Post-Nollan/Dolan World

A citywide or areawide fee structure is probably preferable to property exactions. The latter are typically structured on a case-by-case basis and tend to be ad hoc. Fees tend to be better-suited for spreading the costs of infrastructure needs equitably, and in accordance with a well-founded methodology that takes into account nexus and rough proportionality requirements. For example, it would be desirable wherever possible to finance things like parks, trails, habitat, and open space through the use of fees which compensate affected landowners and spread the costs for such improvements among developers.

Clearly, local governments should adopt fees early enough in their community's development that they can spread out the costs of public improvements among many developers. Jurisdictions that will experience a significant amount of new development in the future should adopt comprehensive fee structures that address many needs simultaneously.

For infrastructure needs that are not citywide or countywide, another alternative commonly used is the reimbursement agreement – the local government can, through ordinance, require a developer to provide infrastructure that exceeds the requirements of the subdivision. The agency and the developer enter into an agreement by which the developer is subsequently reimbursed from charges levied on later developers who benefit from the improvements.²⁴⁵

The takings rules require that a fee system have a well-documented nexus that establishes the causal connections between the development and the impacts that the exaction is meant to mitigate. And, it is necessary to employ a methodology for calculating development impacts and setting fees at a “roughly proportional” level that can withstand

judicial scrutiny. However, this does not necessarily require a complex, expensive methodology. It should be noted that the operative term is “*rough* proportionality.” For example, Santa Rosa’s bicycle facility fee simply uses population growth as a surrogate for bicycle facility demand.

Such advice is of little consolation, however, for cities that are already largely built out but still require major improvements. As in the Mountain View example discussed earlier, even a fee structure can run into takings objections if it places a disproportionate burden on recent development.

Some of the uncertainties about fees and exactions can only be clarified by the courts. However, cities and counties could probably benefit from more systematic efforts to document and disseminate state-of-the-art knowledge about varying forms of fees and exactions, about the methodologies and studies that underpin them, and about how challenges to them have fared in the courts. Model ordinances and studies for various kinds of fees might also be useful.

Addressing the Chilling Effect

I have talked about the fiscal constraints governments face, and how that makes fees and exactions an important issue. The same fiscal constraints amplify the impact of lawsuits, because cash-strapped local governments will be more risk averse. While litigation can be one way of holding government accountable, it is probably not desirable for policy decisions to be based solely or mainly on the fear of litigation costs. How can the distorting effect of the takings legal climate be reduced?

One way this could be addressed is by finding mechanisms for cities and counties to insure against large takings claims. Takings law is notoriously unpredictable, and a city or county could suddenly find itself facing a very costly and quite unexpected lawsuit or judgment. Clearly it would not be desirable to provide insurance that completely insulates local governments from accountability. But defending a lawsuit can be prohibitively costly even if the takings claim is not valid or the government agency thought it was acting within the law.

Overall, the best way to reduce the distorting influence of takings litigation is to avoid disputes over takings altogether. For this reason, the takings rulings can provide strong incentives to plan more systematically, and to plan ahead more. Such changes would yield the most benefit in communities that still have some significant growth ahead of them. A takings claim is far less likely to arise or succeed if the regulation in question is a longstanding policy rather than a new condition or change abruptly imposed upon an owner in response to a particular development proposal.

Some examples of ‘takings avoidance’ strategies:

- Disputes over exactions are less likely if a rational, comprehensive fee structure is applied early and consistently, to spread infrastructure costs among many developers according to the impact of their projects.
- As illustrated in the case study on Whaler’s Cove, the best opportunity to guarantee public access to a beach may be years before a developer proposes to build next to it.
- Similarly, a city or county has a much better chance of preserving open space if low-density zoning in undeveloped areas is a feature of its general plan long before anyone proposes building on the land in question.
- Land needed for freeway interchanges should ideally be secured long before extensive development creates traffic problems and drives up land costs.
- A city or county should be careful where it allows the division of land into small parcels. Once people own parcels that cannot be economically used for anything other than building houses, it will be difficult, politically and perhaps legally, to re-designate that land for low-density purposes such as open space or agriculture.

A cornerstone of any successful takings claim is the owner’s contention that his or her “investment-backed expectations” were thwarted by a regulatory action (a principle enshrined in the U.S. Supreme Court’s seminal *Penn Central* decision). Hence, a local government protects itself from takings claims by thinking long-term, laying the groundwork for project-specific findings with appropriate policies and goals in the general plan, specific plans, zoning ordinances, and so forth.

Although this advice is probably of most benefit in a community that is not close to buildout, it applies in built-out cities as well. As the survey results indicated, variances, conditional use permits, and design review can be as contentious as zoning or subdivision approval. Vivian Kahn, a planning consultant in the Bay Area, notes that many of the more built-out cities have design review and permit approval processes that don’t properly tie decisions to policies in the zoning ordinances and general plan. Such communities often end up in divisive “NIMBY” (“Not-In-My-Backyard”) fights as citizens pressure regulators to restrict individual projects. Such situations offer developers and property owners little consistency or predictability, which can increase the risk of property rights disputes.²⁴⁶

In rapidly growing communities, regulators may find themselves under increasing pressure to control sprawl or preserve open space and habitat. But growth control measures are likely to raise property rights objections unless growth concerns are addressed early in the life of the community. “We have a difficult time getting down-zoning,” notes a Bay Area open space advocate. “Maintaining existing zoning is easier. The politics of down-zoning are so touchy that sometimes you don’t even try.”²⁴⁷

In general, the moral of many a takings story is that local governments are more likely to run afoul of takings law if they address their needs on an ad hoc, project-by-project basis. “By the time you get down to a specific project, especially a smaller one, you’re going to have trouble getting what you want,” notes planning consultant Terry Watt of efforts to preserve open space in the crowded Bay Area.²⁴⁸ Janet Ruggiero, Planning Director of the City of Citrus Heights, concurs: “The argument should be at the policy level rather than the project level. You should build the nexus into the plan so the developer knows what he’s facing going into that community.”²⁴⁹

Unanswered Questions

I will conclude by listing a few areas in which our conclusions suggest that further research and discussion would be fruitful:

- Why are takings issues more prevalent at the county level than at the city level?
- What kinds of takings lawsuits are occurring? How significant are the judgments and settlements being paid out? How much money is being spent defending such cases? What sorts of situations and actions have given rise to the most costly lawsuits?
- This study surveyed planners. What are the perspectives of developers, attorneys, and other players in the planning arena?
- What are the options for insuring local governments against takings claims?
- What is the state of the art for establishing nexus and rough proportionality for various kinds of fees? What methods and approaches have been used and with what results?
- What options exist for funding infrastructure in cities and counties that are too built-out to raise significant capital through impact fees?
- How can the sorts of “takings avoidance strategies” mentioned above be systematically incorporated into the routine practice of land use planning throughout the state?

The first three items highlight the fact that there is still a great deal we do not know about the impact of the takings rulings.

The last four items call attention to what we do know about takings: that it is something local governments are trying to adapt to, with varying approaches and varying degrees of success. This study has indicated some common themes and problems, but largely leaves open the question of how best to address them.

APPENDICES

Appendix I: Survey Questionnaire

Please answer these questions to the best of your knowledge. If you would like additional space to add comments or expand upon answers, you may use the back page of the survey. *Your responses to the questionnaire will remain completely confidential. Only aggregate data from all the survey responses will be reported.*

Thank you in advance for your participation.

Q1. Please provide the following information.

Name of county: _____

Name and title of person filling out this questionnaire: _____

Number of years that you have worked as a planner in this county: _____

Would you like to receive a copy of the results of this study? [Yes [No

Q2. How familiar are you with the following U.S. Supreme Court cases and their legal implications? (For each case, indicate with a check mark whether you are NOT familiar, SOMEWHAT familiar, or VERY familiar.)

	<u>Not Familiar</u>	<u>Somewhat Familiar</u>	<u>Very Familiar</u>
<i>First English Evangelical Lutheran Church of Glendale v. County of Los Angeles</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Nollan v. California Coastal Commission</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Dolan v. City of Tigard</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Lucas v. South Carolina Coastal Council</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Suitum v. Tahoe Regional Planning Agency</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<i>Del Monte Dunes v. City of Monterey</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Q3. a) How often in your county's meetings, deliberations and discussions does someone oppose a proposed or existing land use policy, regulation, or decision on the grounds that it could *constitute a taking* (including a regulatory taking, temporary taking, or inverse condemnation)? (Circle the number of your answer.)

- 1 Never
- 2 Once every few years
- 3 About once a year
- 4 Two or three times a year
- 5 More than three times a year

Q3 Continued.

b) How often do you think that the opposition described in part (a) occurs now as compared to when you first began working as a planner in this jurisdiction? (Circle the number of your answer.)

- 1 It occurs **less often** now than when I first started as a planner in this jurisdiction
- 2 **No difference** now as compared to when I first started as a planner in this jurisdiction
- 3 It occurs **more often** now than when I first started as a planner in this jurisdiction
- 4 Don't know

IF YOU ANSWERED "NEVER" (CHOICE 1) IN PART (a), THEN SKIP TO Q4 ON THE NEXT PAGE.

c) Please indicate in what stage(s) of planning, regulation, or other decision-making the opposition described in part (a) has occurred. (Please check ALL that apply.)

- | | |
|--|--|
| <input type="checkbox"/> Changes in general or specific plan | <input type="checkbox"/> Zoning changes |
| <input type="checkbox"/> Subdivision approval | <input type="checkbox"/> Building permits |
| <input type="checkbox"/> Conditional use permits/variances | <input type="checkbox"/> Rent control ordinance or regulations |
| <input type="checkbox"/> Other (please specify) _____ | |

d) We would also like to know whether any of the takings-related opposition dealt with in the previous parts of this question has arisen specifically in the context of *fees or exactions* for development. Since the time when you first started working as a planner in this jurisdiction, do you know of instances in which someone objected to or opposed fees or exactions for development on the grounds that these might constitute a regulatory taking? (Check yes or no.)

☐ Yes ☐ No

PLEASE CONTINUE TO NEXT PAGE

Q3. Continued

e) If you answered “no” in part (d), skip to **Q4**. If you answered “yes,” please indicate what sorts of fees or exactions have been the subject of this opposition. (For each type of exaction that has been objected to as a possible taking, check the appropriate boxes indicating whether opposition has arisen in connection with fees, with easements or dedication of property, or both. Leave the boxes blank where no such objections have occurred.)

<u>Type of Exaction That Was Objected To</u>	Objections to Objections to Easements or Fees Dedication of
Property	
Open space or parks
Public trails.....
Access to coast or other scenic or recreational resource
Public transit system.....
Building or modifying road(s), interchanges or overpasses.....
Bicycle paths
Low- or moderate-income housing
Schools
Water or sewerage infrastructure
Police or fire protection.....
Flood control or other public safety
Mitigation of wildlife, endangered species, or wetlands impacts
Other (please specify) _____	

Q4. a) In your opinion, are there any types of fees or exactions that your county has become less likely to seek from developers as a result of the precedents set in the U.S. Supreme Court’s *Nollan* and *Dolan* decisions (as codified in AB 1600 and Government Code §66000 *et seq.*)? | Yes | No

b) If you answered “yes” in part (a), please indicate below what sorts of fees or exactions have been affected. If you need more space you may use the back page of the survey.

Q5. a) How often does it occur that your county is *threatened with litigation* (orally or in writing) by a property or business owner for an alleged regulatory taking, temporary taking, or inverse condemnation? (Circle number.)

- 1 Never
- 2 About once every few years
- 3 About once a year
- 4 About two or three times a year
- 5 More than three times a year

b) Do you think the frequency of such threats has increased, decreased, or stayed about the same since the time you first started working as a planner in this jurisdiction? (Circle number.)

- 1 Increased
- 2 Decreased
- 3 Stayed about the same
- 4 Don't know

Q6. Since 1987, has your county ever been *sued* for an alleged regulatory taking, temporary taking, or inverse condemnation? (Check yes or no.) ☐ Yes
☐ No

Q7. Does your county's liability insurance cover any costs associated with takings litigation? (answer yes or no, or if your insurance is ambiguous on this, answer "uncertain".)

☐ Yes ☐ No ☐ Uncertain

Q8. Since the time you first started working as a planner in this jurisdiction, do you think a desire to avoid takings litigation has prompted your county to use development agreements more often (for example, in order to obtain exactions that might otherwise be challenged as a taking)? (Check yes or no.)

☐ Yes ☐ No

Q9. a) During the last ten years, has concern about the takings issue prompted your county to adopt new standards for creating written findings or an administrative record of land use decisions?

☐ Yes ☐ No

b) Has concern about the takings issue led your county to adopt new standards, guidelines, or policies for the levels of fees or exactions the county will seek from developers during the last ten years?

☐ Yes ☐ No

c) In the last ten years, has your county ever conducted a study to ascertain, *for a specific development project*, the fees or exactions that would be permissible under the standards established by the *Nollan* and *Dolan* decisions (as codified in AB 1600 and Government Code §66000 *et seq.*)?

☐ Yes

☐ No

d) If you answered “yes” to parts (b) or (c), did your county ever employ private consultants to conduct these studies?

☐ Yes

☐ No

Q10. a) Since 1987, the U.S. Supreme Court has made several decisions that have set significant precedents in the law of takings. Can you think of any specific examples in which these precedents caused your county to make a land use decision or policy that was different from what you believe the county would have done in similar circumstances prior to these Supreme Court precedents?

☐ Yes ☐ No

b) If you answered “yes” in part (a), please indicate below the stage or stages of the land use planning process in which your example(s) occurred and briefly describe (in a sentence or two) the type of action or decision affected. For more space you may use the back page of the survey.

Stage of Process

Briefly Describe Decision or Policy Affected

☐ General or specific plan

☐ Zoning changes

☐ Subdivision map approval

☐ Building permits

☐ Conditional use permit/variance

☐ Rent control ordinance/regulations

☐ Other (please specify)

Q11. Please indicate the extent to which you agree or disagree with the following statements. (Circle the number of your answer).

a) “The nexus and rough proportionality standards established by the *Nollan* and *Dolan* decisions, when followed carefully, simply amount to good land use planning practice.”

- 1 Strongly disagree
- 2 Mostly disagree
- 3 Mostly agree
- 4 Strongly agree
- 5 No opinion

Q11 Continued.

b) “U.S. Supreme Court decisions on takings have helped to create a legal climate that *reduces* our county’s ability to manage land development to serve the needs of our community.”

- 1 Strongly disagree
- 2 Mostly disagree
- 3 Mostly agree
- 4 Strongly agree
- 5 No opinion

THANK YOU FOR YOUR COOPERATION IN COMPLETING THIS QUESTIONNAIRE.

Please return this questionnaire using the stamped envelope provided. Or, you may send it by fax to (916) 654-5829.

If you have any questions, please call Dan Pollak (916) 657-2645 or send e-mail to dpollak@library.ca.gov

Appendix II: Reduced Use of Some Fees and Exactions Due to Takings Issue

In Question 4(a), respondents were asked to indicate whether there were “any types of fees or exactions that your city/county has become less likely to seek from developers” as a result of *Nollan* and *Dolan*. In Question 4(b), respondents were given space to indicate what sort of fees or exactions have been affected in this way. Out of 50 cities and 12 counties that answered “yes” to Question 4(a), 48 cities and 10 counties provided more detailed information in Question 4(b).

The following are the responses given by those 48 cities and 10 counties. The responses are mostly reproduced verbatim except for removal of extraneous comments, expansion of some abbreviations and removal of references that would identify the respondent.

CITIES:

- Project enhancements related to remodels of buildings (when CUP's are sought)
- Land dedication or fees for fire stations to serve new growth.
- Off-site exactions
- Off-site improvements (e.g. roads, sewer, water lines)
- Park fees from commercial/industrial development
- Open space dedications (parks, trails, etc.); fire station dedication
- Traffic mitigation fees have been modified. Request for a developer to pay all of the costs for a traffic signal was reduced to fair share.
- Street improvements and ROW dedications.
- We make sure there is a solid connection between development burden & fee. Prepared a detailed nexus study for housing mitigation fees.
- Public access fees, housing in-lieu fees.
- Trail easements
- We are less likely to ask for dedication of public access to the beach...We are also very careful for any off site exactions unless a clear nexus has been established.
- Storm drain impact fees
- Historic preservation easements/recreational amenities/preservation of ridgelines
- Intersection/street improvements
- Fees and exactions are closely related to project impacts vs. implementation of infrastructure, etc. depicted on General Plan maps.
- Community facilities fee
- Dedication of property to widen a street; exactions to pay for medians to mitigate traffic impacts.
- Offsite street, walkway or drainage improvements with a questionable nexus to the impacts of a project.
- Pathway easements, conservation easements.
- AB 1600 has slowed our progress on implementing a wide variety of possible fees due to the demands of compliance (cost and time involved.)
- Special districts
- We have moved from more exaction-based to more fee-based.

- Make sure there is a nexus between the project and the specific dedication of trail or public access.
 - City considered, then rejected, a new transportation impact fee in part due to difficulty of making specific nexus findings required.
 - Traffic mitigation requirements
 - We exercise considerable care to develop the nexus between a project and required fees/exactions. The city previously considered the reasonable relationship but not proportionality.
 - Drainage
 - Developer fees have been changed to license tax on new construction. This avoided the AB 1600 issues. Nexus issues are not a problem with the license tax. City has not exceeded Prop 218 authority.
 - River and creek pedestrian access
 - Street, lighting improvements
 - Public trail easements and dedication
 - Dedication of open space, significant public improvements off-site, easements/dedications that don't have a solid nexus, public transit and alternative transportation
 - On conditional use permit applications: dedication of right-of-way, and off-site improvements, I.e. alley, streets, alley/street lights
 - Traffic mitigation fees or improvements, housing mitigation fees related to demolished affordable housing.
 - Public trails; mitigation of wildlife impacts
 - Public open space dedications
 - All types, particularly traffic related improvements. Since city does not have development fees per se, it is difficult to establish the proportional share of an improvement.
- Dedication for public right-of-way
- Fees must be absolutely justified. This has kept our fee structure than we would have liked for parkland, police/fire impacts, roads, equipment, ongoing service fees through Mello Russ, etc.
 - The extent of public improvements required is moderated by concern relative to taking.
 - A previous requirement for a setback adjacent to a river...is now being purchased by the city. The circulation element is being revised to compensate land owners for over-sized right of ways - development fees are being increased to spread costs more equitably.
 - Exactions which are not on-site of the project where a nexus is more difficult to establish.
 - The nexus regarding road exactions and project impact was not well established in previous adoption of road impact fees. These are now frequently negotiated down through development agreements.
 - Less likely to seek public works improvement fees for certain capital projects if not likely to construct within a 5-year time frame.

COUNTIES:

- Traffic impact fees which exceed rough proportionality to impact of project on those roads affected...Highway R/W dedications.
- Access easements, physical improvements beyond need generated by project.
- School fees.
- Coastal access (offers to dedicate); road easements and improvements.
- Recreational trail easements.
- Open space fees
- Development fees for roads and recreation.
- Where there is no nexus
- Trail easements
- Scenic and open space easements; access easements.

Appendix III: Changed Policies & Decisions Due to Takings Issue

In Question 10(a), respondents were asked, “Since 1987, the U.S. Supreme Court has made several decisions that have set significant precedents in the law of takings. Can you think of any specific examples in which these precedents caused your city/county to make a land use decision or policy that was different from what you believe the city/county would have done in similar circumstances prior to these Supreme Court precedents?” If they answered “yes,” they were asked in Question 10(b) to indicate the stage of the planning process at which this occurred, and to “briefly describe” the decision or policy affected.

Of the 45 city respondents and 11 county respondents who answered “yes” to Question 10(a), 37 of the cities and 8 of the counties provided a brief description of the affected decisions or policies. These descriptions are provided below. They have been altered only to remove extraneous comments, expand abbreviations or to remove references that would identify the respondent.

COUNTIES:

Subdivision Map Approval:

- Exactions for trails, open space
- Dedication requirements, improvements (offsite).
- Did not require 'full' CEQA mitigation due to cost
- In general, we now are more concerned with the nexus of project conditions with project description. (Same for conditional use permits)

Conditional Use Permit/Variance:

- Did not require dedications 'beyond rough proportion' to project impact.
- Granted support for construction of single family residence in area “public” wishes to remain recreation.

General Plan

- Density reductions, environmental overlays
- Trails plan.
- Declaring an area as recreation (public) and no development (residential) because it's not in character/consistent with existing use

Zoning:

- Proposal to ban gates in residential subdivisions through zoning text.
- Coastal access, open space easements.
- Permitted uses in open space zoning.
- Limitations on allowed uses

General Plan and Zoning:

- Strong sentiment from public to severely restrict development has led to our balancing act - open space preservation vs. taking. We are careful to allow some reasonable use of land.

CITIES:

Subdivision map approval:

- Conditions related to cost sharing of new roads and trails.
- Extent of street dedications.
- Payment of certain fees by developer.
- Requirement to develop trails shown on General Plan.
- Dedication of freeway ramps/road improvements. City recently adopted a development impact fee based on nexus study.
- Establishing tree removal/re-establishment regulations. Establishing stricter slope-to-parcel area regulations and stricter grading thresholds.
- Dedication of ROW
- Required development agreement to get more improvements than required.
- Dedications/exactions scaled back.
- Development of slide prone land - if there was less of concern with taking, then fewer units would have been allowed.
- City is more careful in requiring street improvements and making sure that what the city requires relates to traffic generated by the development.
- Improvements required by the General Plan may no longer be constructed by one developer if the impacts aren't proportional to the improvements
- Reduced traffic impact fees through development agreement.
- School mitigation

Conditional Use Permit/Variance:

- Conditional use permit/variance: Driveway closures/improvements with service station remodels
- Clear written findings for nexus are established.
- Bus duckouts [*respondent reports being less likely to require smaller commercial developers to provide them – ed.*].
- Relating circulation impact fees to trips generated vs. generic land use categories.
- Offsite alley/street improvements.
- Conditions of approval, generally
- Trail access to river
- Conditional use permits and variances: imposing certain requirements without applicant's approval.

- Requirement for street dedications or irrevocable offer of dedication for site improvements.
- No nexus for a regional bike trail.

General Plan

- Not requiring public parks to be designated with land use proposals for GP amendments.
- Modifying a general plan designation.
- The word “should” is used in policies rather than “shall.”
- Development agreement - school construction and dedication of open space.
- Offsite drainage problems
- Regulations re airport safety zone overlay made more flexible.
- Park dedication/fee
- Policy requiring land dedication for riparian restoration including public bikeways has been amended
- Allowing some development potential on private property designated for parks or open space

Zoning:

- Rezone application process.
- Designation of open space.
- New zoning district to accomplish housing above retail or commercial where properties are zoned commercial (died).
- Limit non-conforming use sunset provision

General Plan & Zoning:

- City inadvertently designated/zoned a parcel for open space, not realizing it wasn't part of a larger parcel. Had to redesignate and zone to allow some development.
- Backed off from extent of density reductions.
- General plan designated a property for “Habitat Restoration Area;” owner filed lawsuit. Town amended general plan to allow offices to avoid litigation.

Other:

- Rent control: strengthen of rent control regulations weakened.
- Housing mitigation fee policy.
- Restructured the traffic impact mitigation fee regulations to better link the impact w/fee
- Building permits: payment of impact fees (now license tax)
- Issuing a grading permit within an endangered species habitat area without a take permit from fish & wildlife
- “I can't necessarily identify a specific example,” but Nollan and Dolan “were considered and adjustments were made in what the city was requesting.”

- Road/frontage & water/sewer improvements as conditions of approval on discretionary land use and subdivision entitlements.
- Inclusionary housing, transit, open space, other public amenities
- Site Plan review - Right of Way dedication.
- Adoption of affordable housing mitigation fee.
- Public works fees (engineering).

Appendix IV: Analysis of Survey Response Rates

Because not all cities and counties responded, this is not a random sample, and the question arises of whether some sampling bias was introduced by the self-selection of the respondents. In other words, how representative is our sample of all the state's cities and counties?

As the following tables show, the response rate was somewhat higher among larger and faster-growing cities. This implies that, to some extent, the results may be more representative of these larger, faster-growing communities. The response rate also varied among different regions of the state.

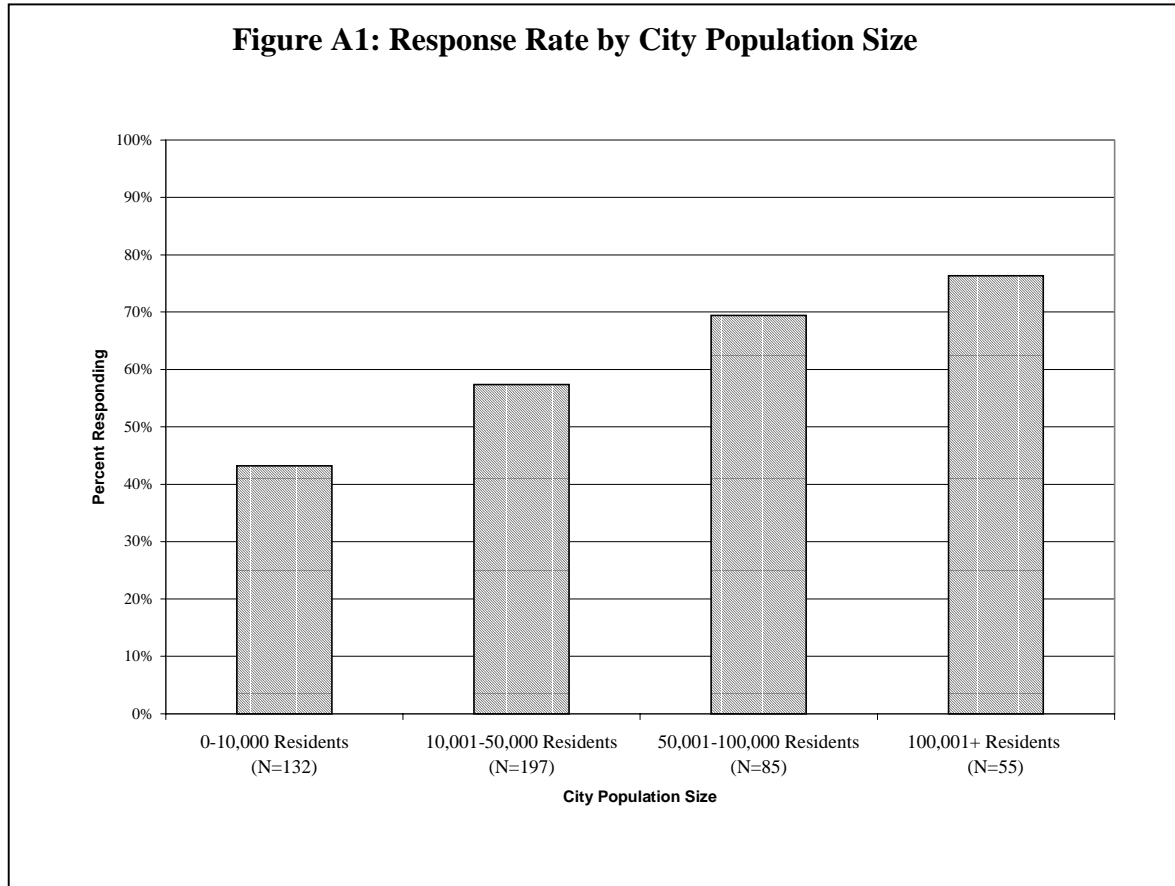
With the state broken down into four regions*, the distribution of responses was as follows:

Table A1: City and County Response Rates by Region		
<u>Region</u>	<u>Cities Responding</u>	<u>Counties Responding</u>
Southern CA (202 cities, 7 counties)	64%	86%
Bay Area (100 cities, 9 counties)	54%	56%
Sacramento Region (17 cities, 4 counties)	53%	50%
Other (153 cities, 38 counties)	54%	63%
ALL REGIONS	58%	64%

Response rates were highest from southern California (Los Angeles and San Diego regions). However, each region is well-represented in the sample.

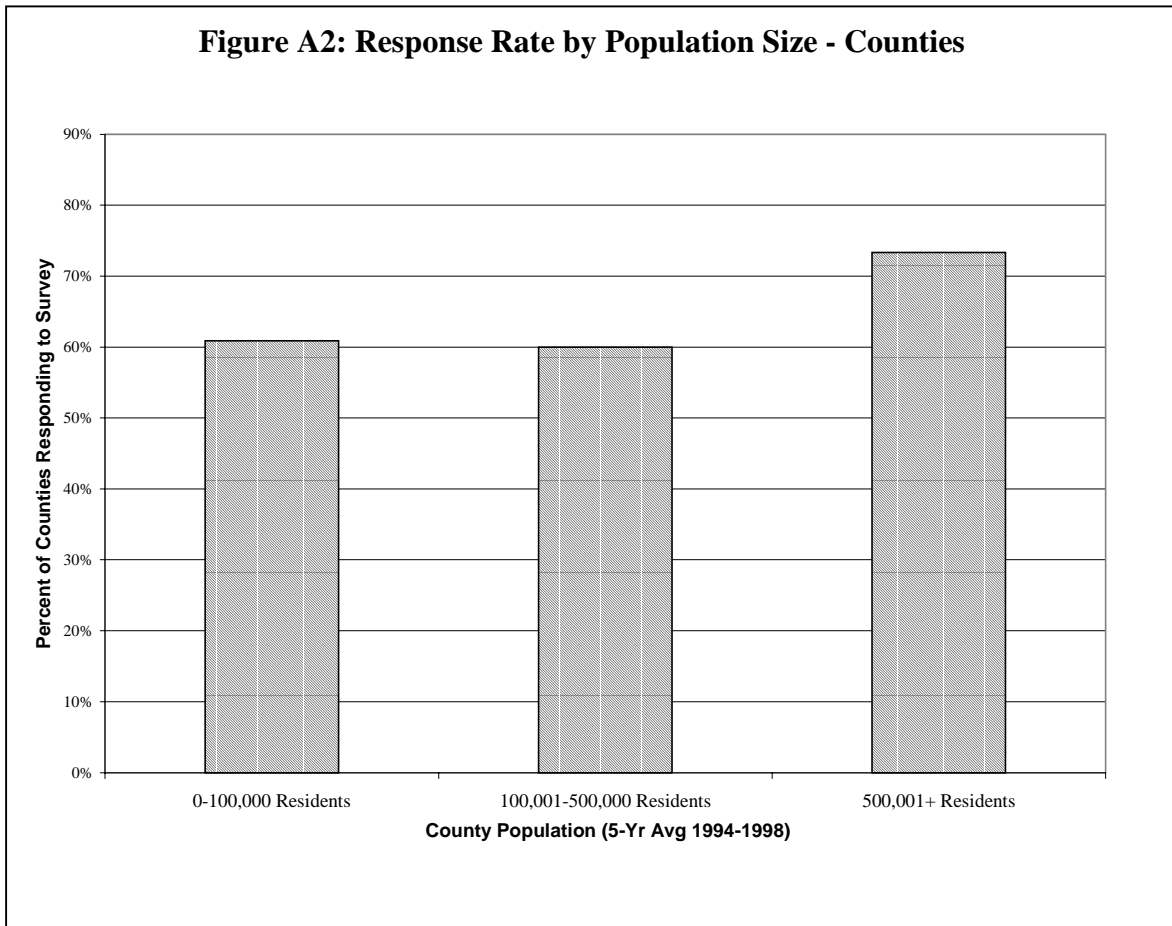
* For an explanation of the regions, see Appendix V.

In addition, I looked at response rate by population size.

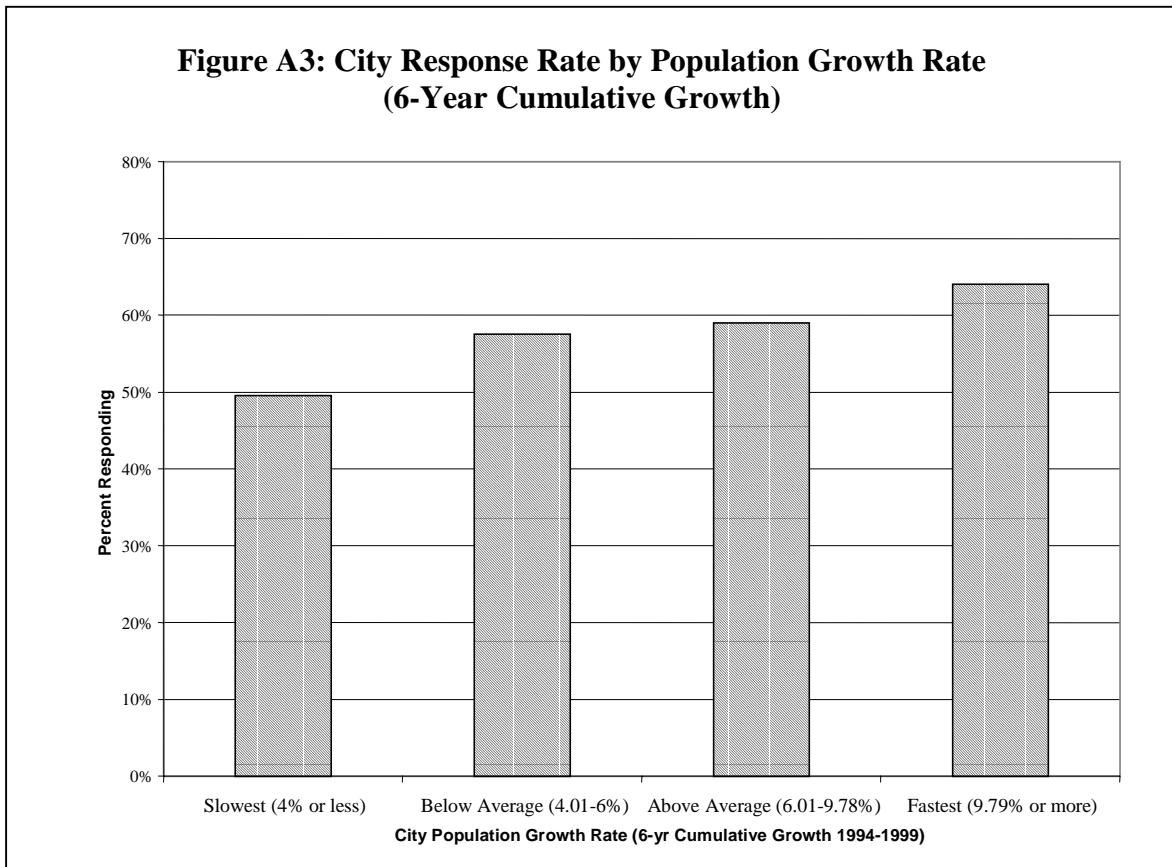


The response rate appears to be correlated with city population size. In other words, larger cities are disproportionately represented in the sample. This might be due to the fact that larger cities tend to have larger planning staffs.

A similar pattern appears in the county responses, although to a lesser degree:

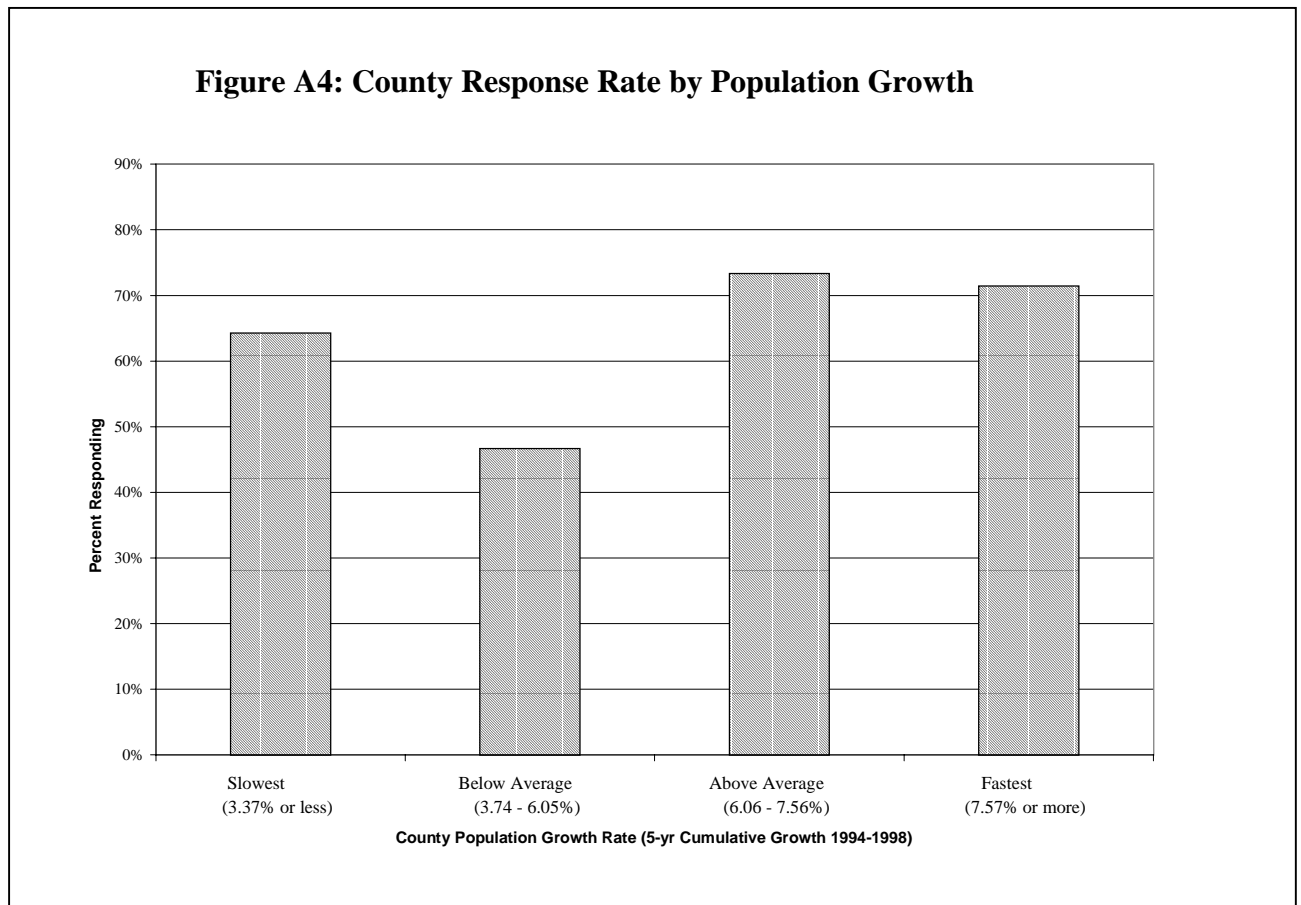


I also compared response rates based on population growth rates.* It appears that the city response rate may be related to the population growth rate.



* Growth rate categories were created by calculating five-year cumulative population growth rates, and then dividing cities and counties into four categories containing roughly equal numbers of jurisdictions.

There is no clear relationship between growth rate and response rate among the counties:



It is possible that faster-growing communities have a greater interest in takings issues due to having more development, which might make them more likely to respond to the survey. The data seem to support this for the cities, but for counties the trend is somewhat ambiguous.

Conclusion

There are variations in response rate that could potentially affect the overall results. However, the sample appears to be broadly representative of different regions, population sizes, and growth rates. The most pronounced bias seems to be that of city population size – there seems to be a consistent, marked trend toward a higher response rate with larger population size. In Appendix VI, we see that population size is correlated with some of the takings-related phenomena, such as frequency of takings objections. Therefore, the results of the survey could arguably over-represent the experience of larger-population cities. This in turn could mean that the results tend to overstate the frequency of phenomena (such as takings objections) that are correlated with population size.

Appendix V: Definition of Regions

Regions were defined as collections of counties, as follows:

Southern California: Ventura, Los Angeles, San Bernardino, Orange, Riverside, Imperial, San Diego

SF Bay Area: Sonoma, Napa, Solano, Marin, Contra Costa, Alameda, San Mateo, Santa Clara, San Francisco

Sacramento Region: Placer, El Dorado, Yolo, Sacramento

Other: Del Norte, Siskiyou, Modoc, Humboldt, Trinity, Shasta, Lassen, Tehama, Plumas, Mendocino, Glenn, Butte, Sierra, Lake, Colusa, Nevada, Sutter, San Joaquin, Amador, Calaveras, Stanislaus, Santa Cruz, Tuolumne, Alpine, Mono, Mariposa, Merced, San Benito, Monterey, San Luis Obispo, Santa Barbara, Kern, Kings, Fresno, Tulare, Inyo, Madera, Yuba

Appendix VI: Relationships Between Community Characteristics and Survey Responses

The survey showed that some cities and counties find takings concerns to be a source of controversy while others do not. Similarly, some cities and counties have changed their regulatory behavior in response to takings issues, while others have not. Can we make generalizations about what kinds of cities and counties are most impacted by takings issues?

In an effort to answer that question, I attempted to find statistical patterns among the survey respondents. Specifically, I looked for correlations between community characteristics and the incidence of takings-related problems. For example, are takings objections more common in faster-growing counties? Are larger cities more likely than smaller ones to change their regulatory behavior, or vice-versa? To explore questions such as these, I broke down the survey results according to several community characteristics:

- 1) Population Size
- 2) Rate of Construction of Single Family Homes
- 3) Population Growth Rate
- 4) Presence of Aggressive Growth Control Measures

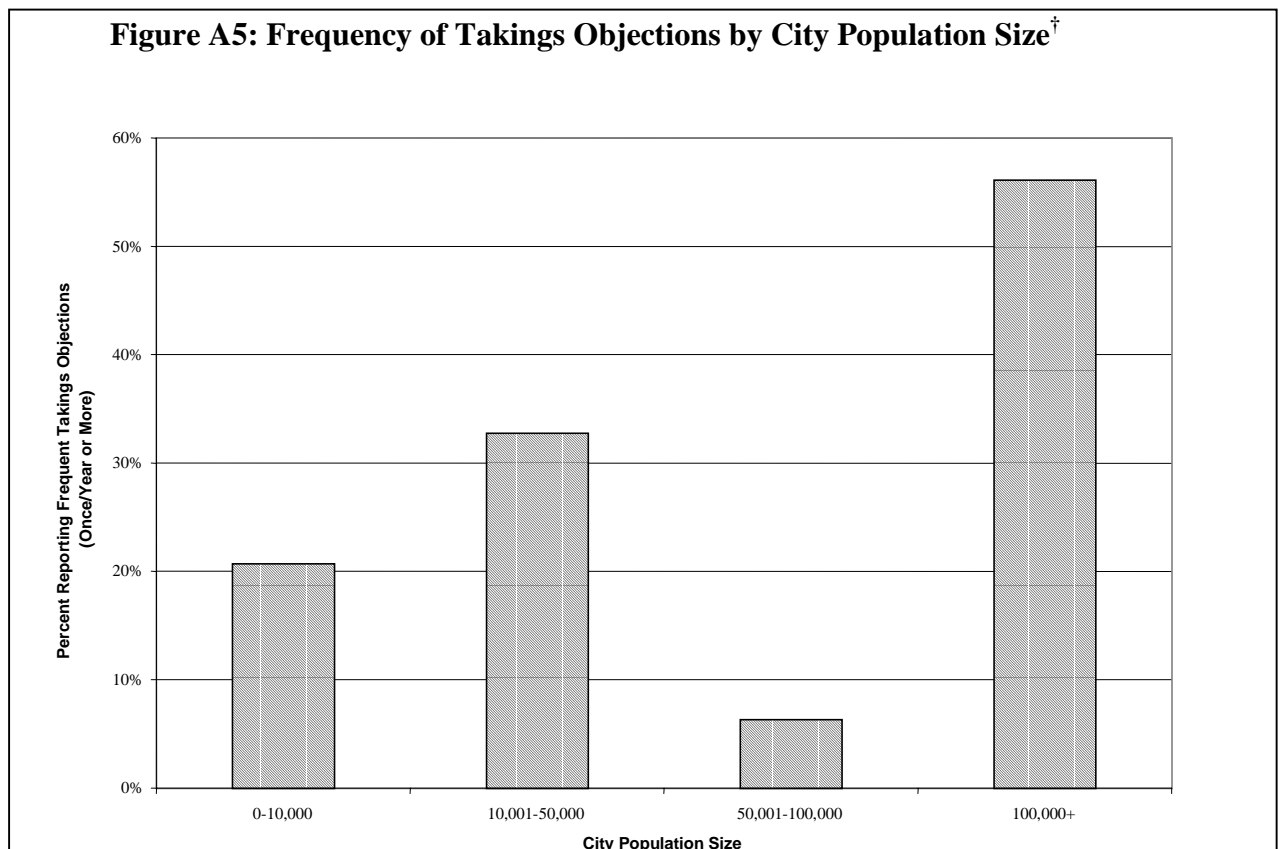
It should be kept in mind that these cross-tabulations of the data are useful for suggesting possible patterns, but one should be cautious about drawing any definitive conclusions from them. For one thing, a correlation between two variables does not necessarily mean that there is a cause-and-effect relationship between them. And in a complex area such as land use planning, there are bound to be many variables at work, so a correlation between, say, population size and takings issues could be due not just to the influence of population size, but to a number of other social, economic or political factors associated with population size.

As it turns out, takings-related phenomena reported in the survey results do seem to increase with increased city population size. Given that the survey response rate also increased with city population size, this indicates that the city results may be biased somewhat, disproportionately reflecting the experience of larger cities. However, there did not appear to be a clear relationship between population size and takings-related phenomena among the counties. As for the other variables, I expected that higher residential construction rates would be associated with rapidly developing communities and would give rise to takings-related issues. The data support this as regards cities, but not for the counties. Population growth rate did not seem to be a good predictor of takings-related issues for either cities or counties. I also expected that communities that had instituted strong growth control measures would have an aggressive stance toward land use regulation that could manifest itself in a higher incidence of conflict over takings issues. The data seem to support this hypothesis to a limited extent. Both cities and counties that had instituted growth control measures showed higher incidences of takings objections. Such counties (but not cities) reported a higher rate of changed regulatory behavior due to takings issues.

1) Effects of Population Size

Did larger cities or counties experience a greater frequency of takings objections than smaller ones? I divided the city respondents into four tiers based on population size. To simplify the comparison, I grouped responses into two types – “Frequent takings objections” meaning objections occurring once a year or more, and “Infrequent” meaning takings objections reported as occurring “never” or “once every few years.”

In general, it appears that a smaller population tends to be correlated with reporting that takings objections occur infrequently (“never” or “once every few years”), while frequent takings objections (once a year or more) are more likely to occur with increasing population size. This correlation was statistically significant to a 90% confidence level. *

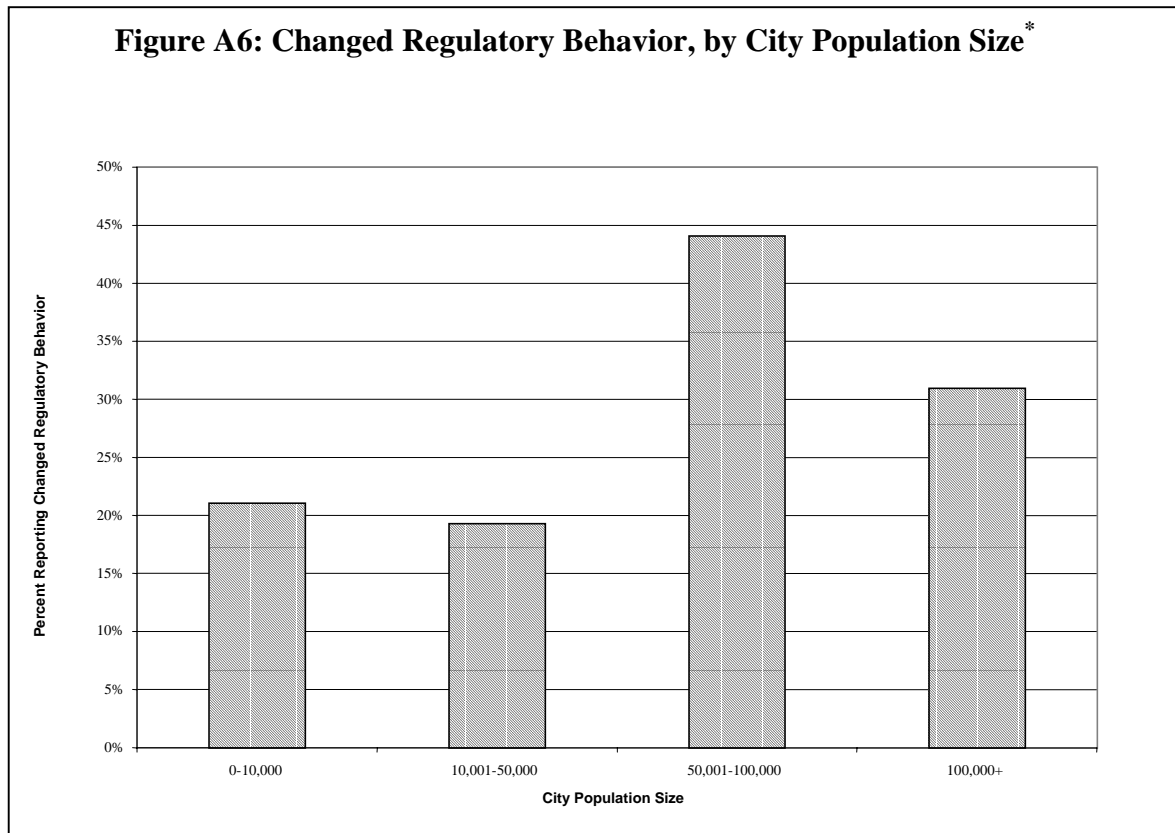


This is not surprising, since all other things being equal, a larger city will have more development activity.

* The Chi-square=14.64 (3 degrees of freedom), indicating a 99%+ confidence level that this distribution is non-random.

[†] Survey Question 3(a). See Appendix I.

As discussed earlier, we can group together respondents who answered “yes” on survey questions 4(a) and 10(a), indicating that they either reduced their use of some types of fees and exactions or that they altered a policy or decision in response to takings issues. I have designated this as the group of respondents that have “changed regulatory behavior.”

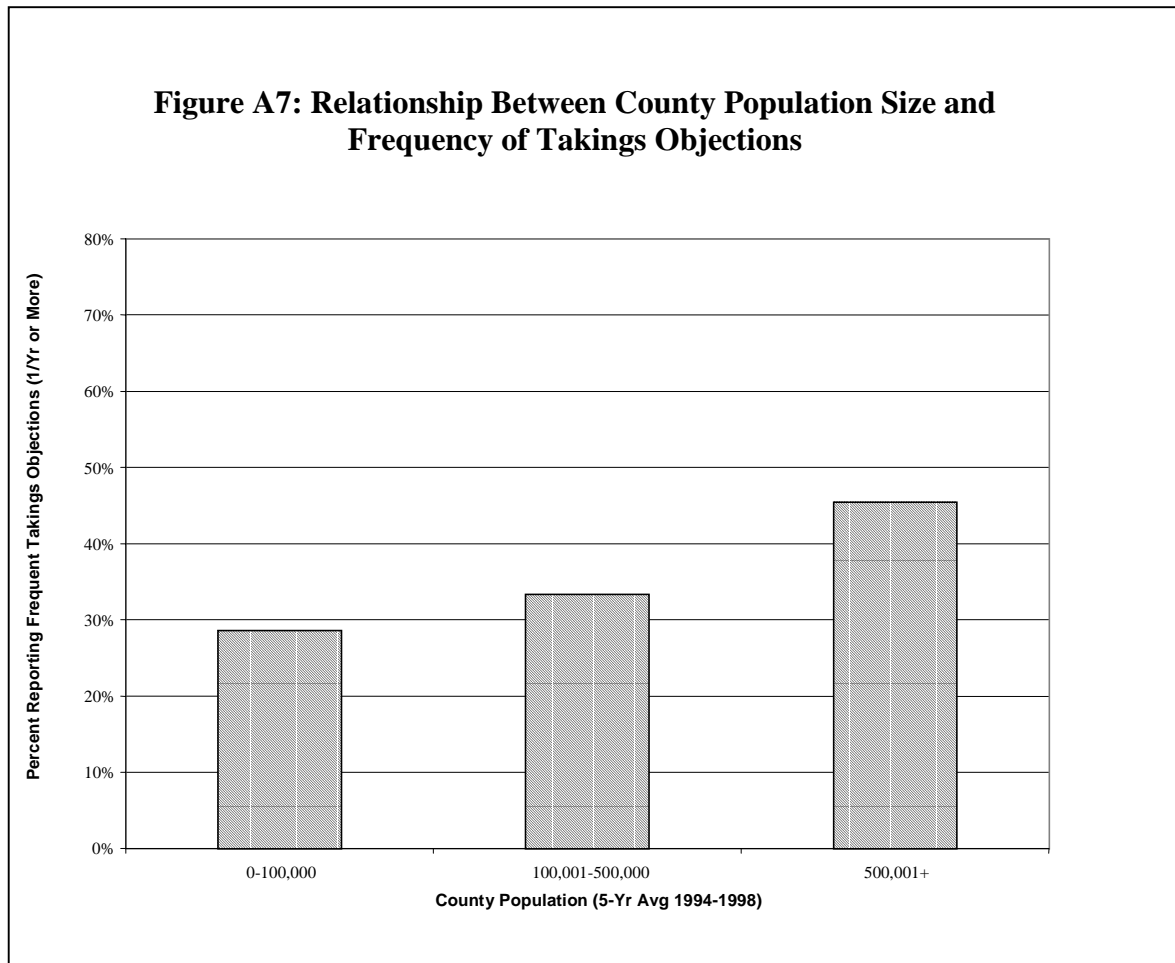


There does appear to be an upward trend, with larger cities being more likely to report changed regulatory behavior. This trend is statistically significant to a 90% confidence level[†]. As noted in Appendix IV of this report, the response rate among cities was biased toward high-population cities. To the extent that takings-related phenomena are associated with population size, it is possible that this could bias the survey results upward somewhat, tending to overstate the occurrence of takings-related objections and policy changes.

* A “yes” is assigned to any who answer “yes” on Survey Questions 4(a) or 10(a).

[†] Chi-Square=17.31 (6 degrees of freedom), indicating a 99% confidence level that the distribution is non-random.

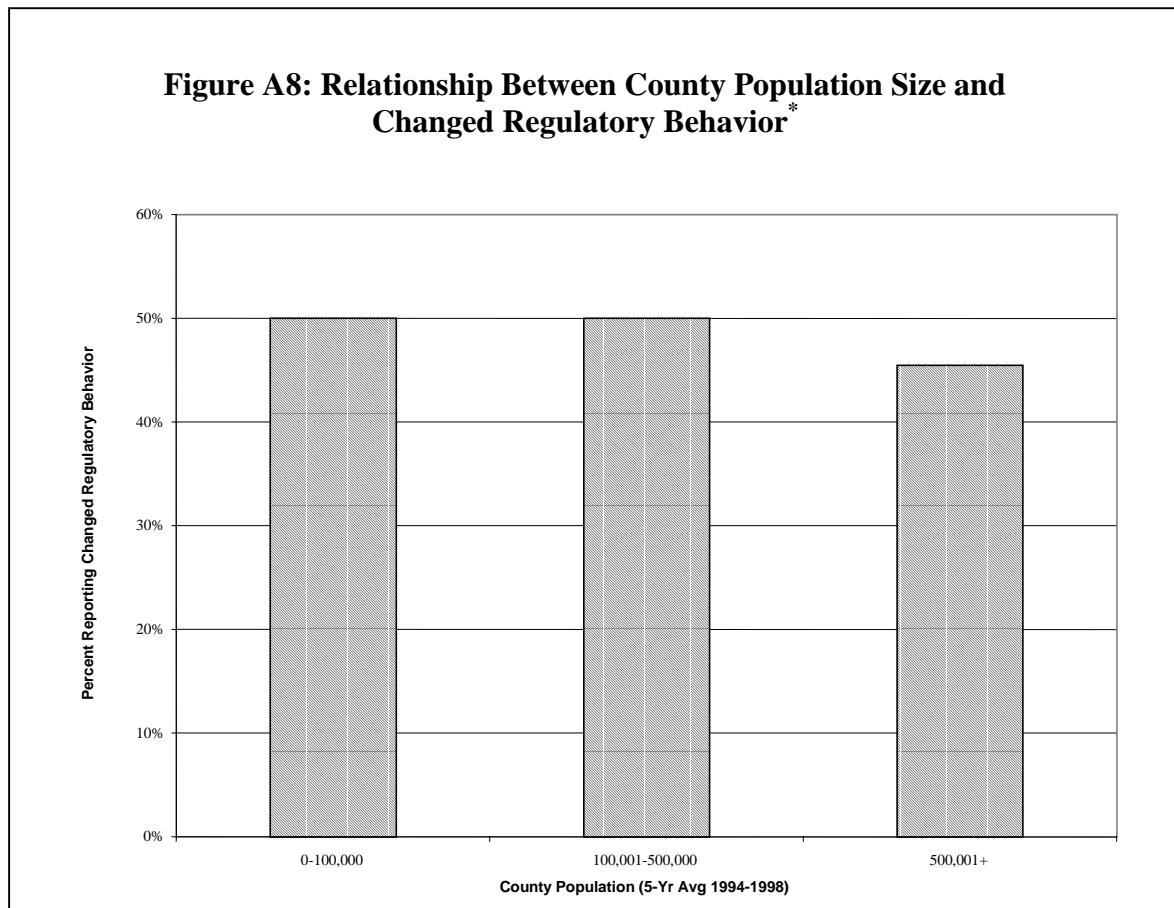
Counties similarly show an upward trend in takings objections with increased population size:



However, the variation seen here is not statistically significant.*

* Chi-Square=0.8 (2 degrees of freedom), indicating a 33% confidence level that the distribution is non-random.

The occurrence of changed regulatory behavior due to takings appears to be quite uniform across the different categories of county population size. Smaller counties are no more likely than larger ones to report changed regulatory behavior.

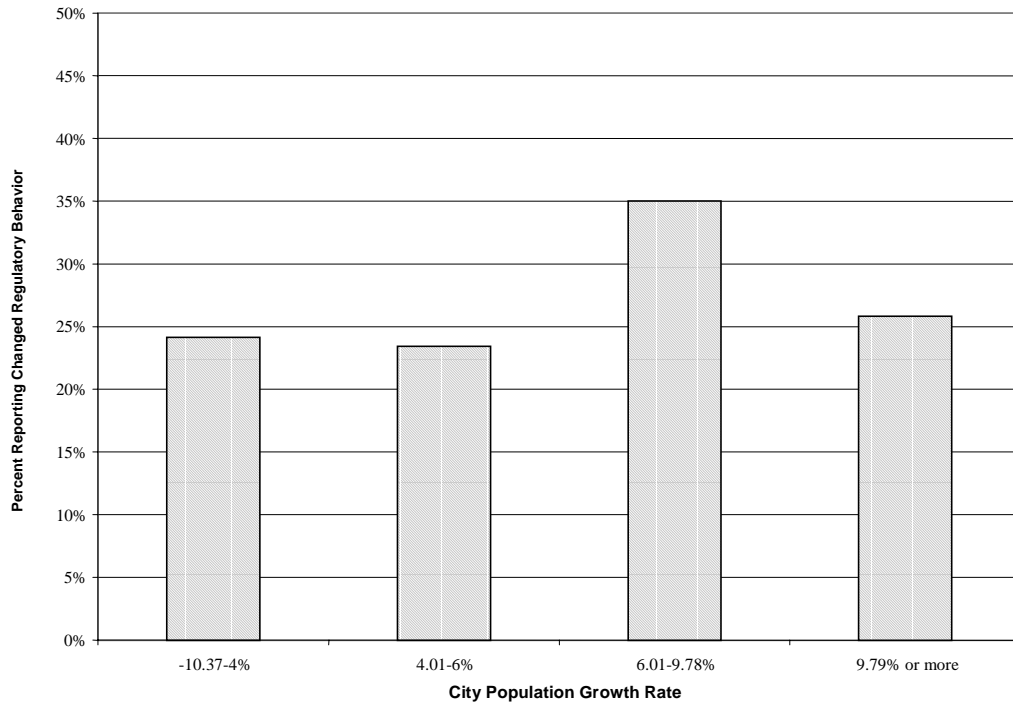


2) Effects of Population Growth Rate

Population growth rate did not appear to have a clearly discernible effect on the survey responses. For example, there did not seem to be either a clear trend or much variability in the results when I looked at the incidence of changed regulatory behavior among cities, broken down by population growth rate.

^{*} Chi-Square=0.64 (2 degrees of freedom), indicating only a 3% confidence level that the distribution is non-random.

Figure A9: Changed Regulatory Behavior, by City Population Growth Rate*



There appears to be an upward trend, but it is not statistically significant.[†]

3) Effects of Residential Housing Construction Rate

I expected to find that takings objections and related phenomena would be associated with cities that are undergoing a higher rate of construction of single family residences. Such construction should be associated with growth and development activity, raising issues of public facilities financing, growth control, and land conservation. These in turn would create controversy over property rights.

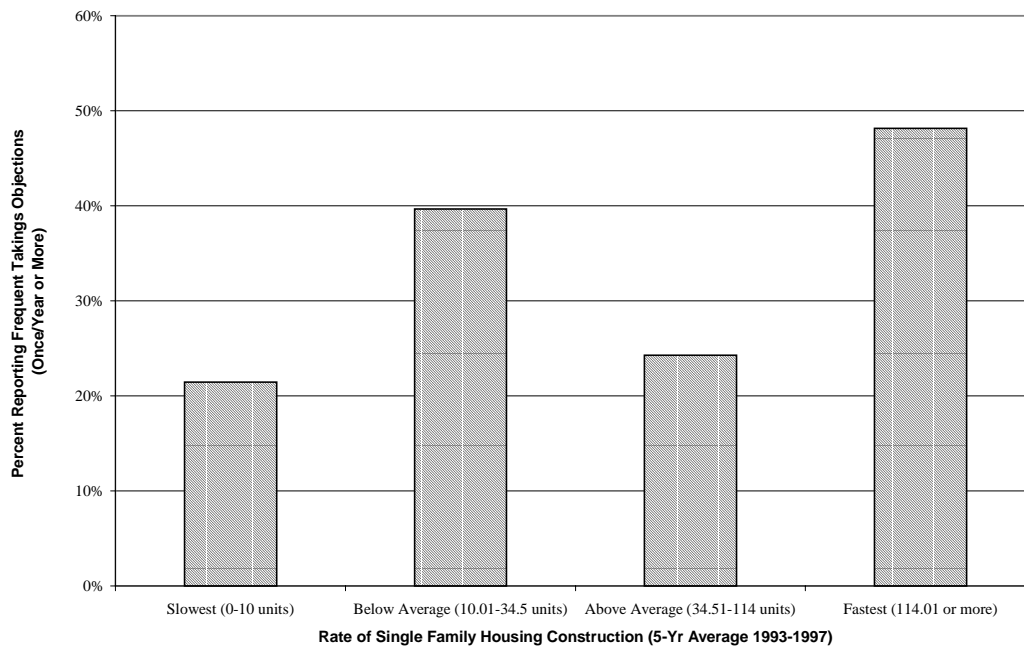
Again I divided cities and counties into four roughly equal-sized tiers, this time based on average annual rates of housing construction over a five-year period. My results indicate that the rate of single family home construction appears to correlate more closely with takings issues than does population growth.

As the chart below shows, the fastest-growing cities are much more likely than the slowest to report frequent takings objections.

* Chi-Square=5.87, indicating a 56% confidence level that the pattern is non-random.

† Chi-Square=5.87, indicating a 56% confidence level that the pattern is non-random.

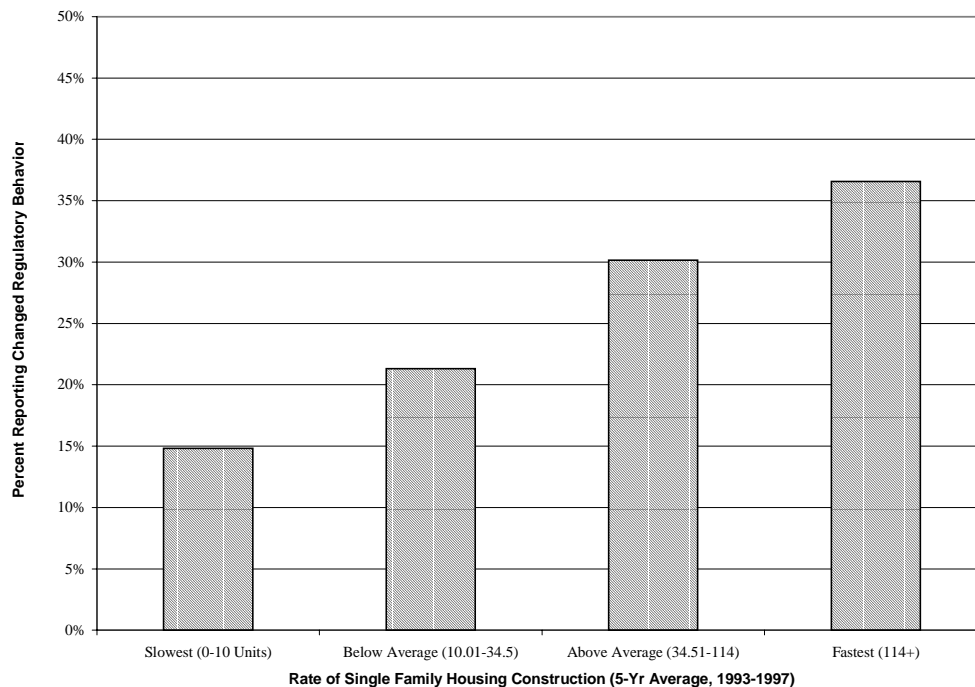
Figure A10: Frequency of Takings Objections, By Rate of City Housing Construction*



In addition, cities that are adding housing at a higher rate are more likely to report that takings issues have caused them to change their regulatory behavior.

* Chi-Square=14.9 (3 degrees of freedom), indicating the distribution is non-random to a 99%+ confidence level.

Figure A11: Relationship Between City Rate of Housing Construction and Changed Regulatory Behavior^{*}



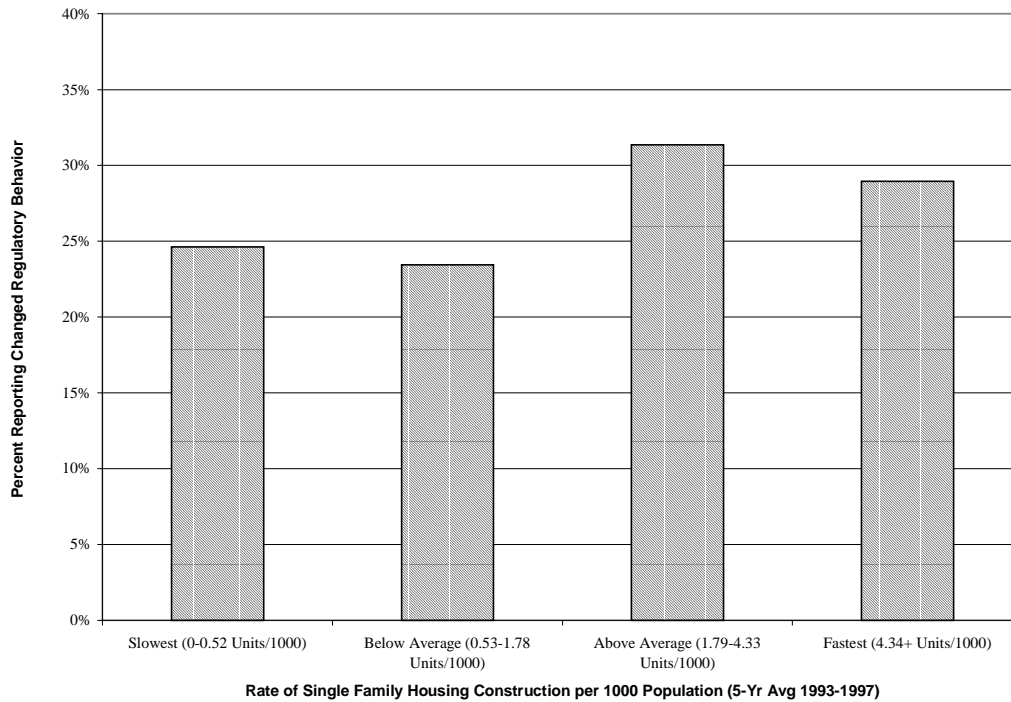
This correlation between rate of housing construction and changed regulatory behavior is statistically significant.[†]

Housing construction is an imperfect indicator of “growth” because it does not take into account the size of the existing population. One thousand units of new housing in Los Angeles (population 3.7 million) represents a much less significant “growth” of the community than 1000 units of new housing in Chowchilla (population 13,300). We can control for this by normalizing the rate of housing construction, so that we are looking at the number of new units being constructed per 1000 population.

^{*} Chi-Square=9.25 (3 degrees of freedom), indicating a 97% level of confidence that the distribution is non-random.

[†] Chi-Square=9.25 (3 degrees of freedom), indicating a 97% level of confidence that the distribution is non-random.

Figure A12: Relationship Between City Rate of Housing Construction (per 1000 Population) and Changed Regulatory Behavior



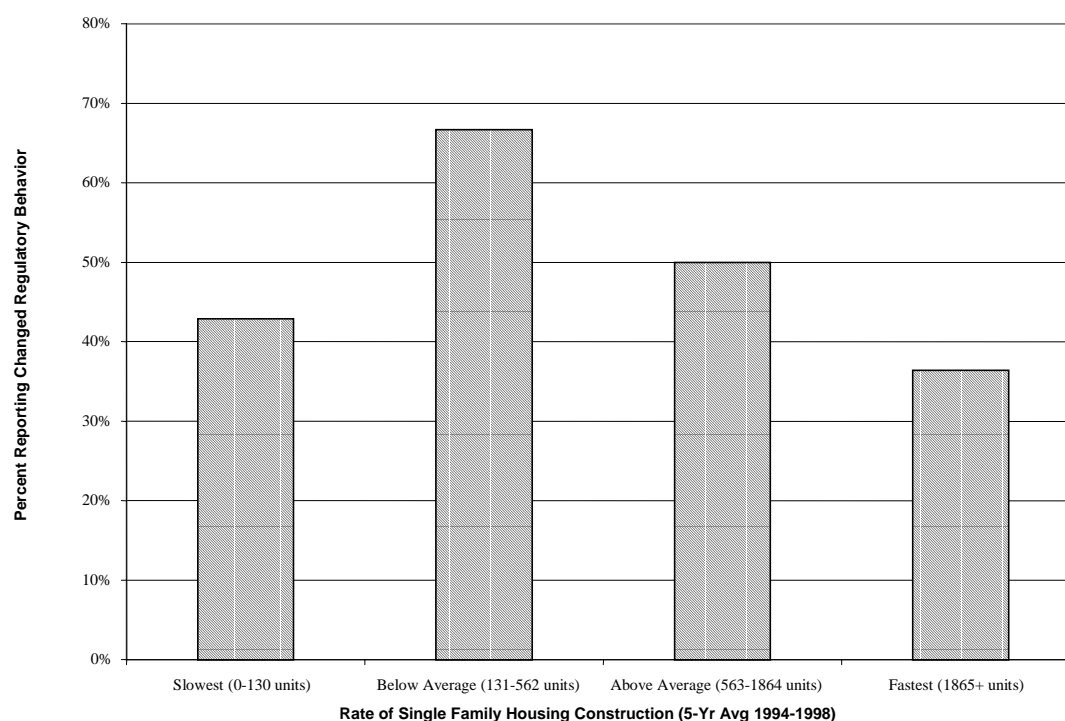
The relationship between housing growth and changed regulatory behavior is not statistically significant when housing growth is normalized for population.^{*} I found this to be the case consistently when I tested housing growth against the various takings survey questions. The rate at which a city is expanding relative to its original size seems to be less important in the takings context than the absolute volume of new housing construction that is occurring.

The relationship between rate of housing construction and takings issues did not appear to be as strong in counties as in cities. For example, there does not appear to be any statistically significant relationship between rate of housing construction and changed regulatory behavior in counties:[†]

^{*} Chi-Square=4.4 (6 degrees of freedom), indicating only a 38% level of confidence that the distribution is non-random.

[†] Chi-Square=1.94 (3 degrees of freedom), indicating a 41% confidence level that the distribution is non-random.

Figure A13: Relationship Between County Rate of Housing Construction and Changed Regulatory Behavior



4) Presence of Aggressive Growth Control Measures

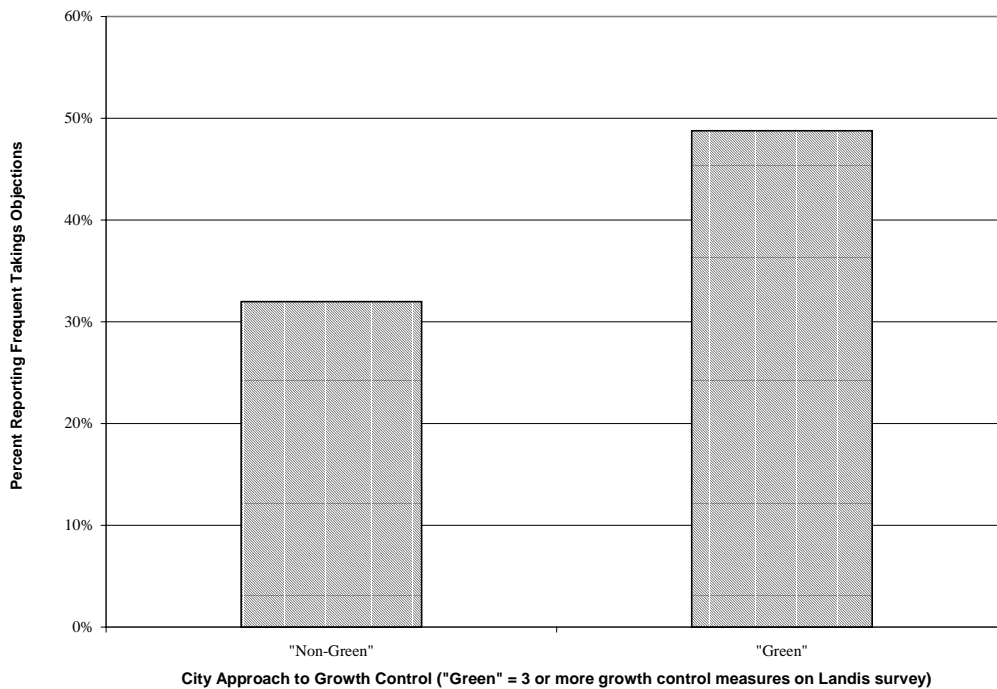
The adoption of urban growth boundaries and other growth control measures are currently an important trend in California. Many communities that have grown rapidly in recent years are now adopting restrictive measures, often the result of grassroots pressure from local residents. “In new communities, the “community” is the farmers and the large landowners” who tend to oppose strict limits on development, says planning consultant Vivian Kahn. “As population increases, it’s the people who already live there. Now their city council is approving all this development and they don’t like it.”* It seems reasonable to expect that regulators enforcing growth control measures will come into confrontation with property owners who find their ability to develop or sell property being limited, both because of the “slow-growth” political climate and the specific growth control ordinances, which impose restrictions on large classes of landowners. In such communities we might expect to find a higher level of confrontations over “takings.”

Professor John Landis of the University of California at Berkeley has conducted a survey of growth control measures adopted by California cities and counties. I divided the 332 cities in this survey into two groups: those that had adopted three or more growth control measures (which I rather arbitrarily designated as “green” cities), and those that had

* Vivian Kahn, personal communication, February 22, 1999.

adopted less than three such measures (“non-green.”)^{*} I then compared the two groups to see if an aggressive stance on growth control (greenness) was associated with a higher level of conflict on takings issues. We might expect this to be the case, since it would indicate that the regulators are willing to place restrictions on development that could adversely affect property values or development plans. This pattern did appear with the city respondents.[†]

Figure A14: Relationship Between City Adoption of Growth Control and Frequency of Takings Objections

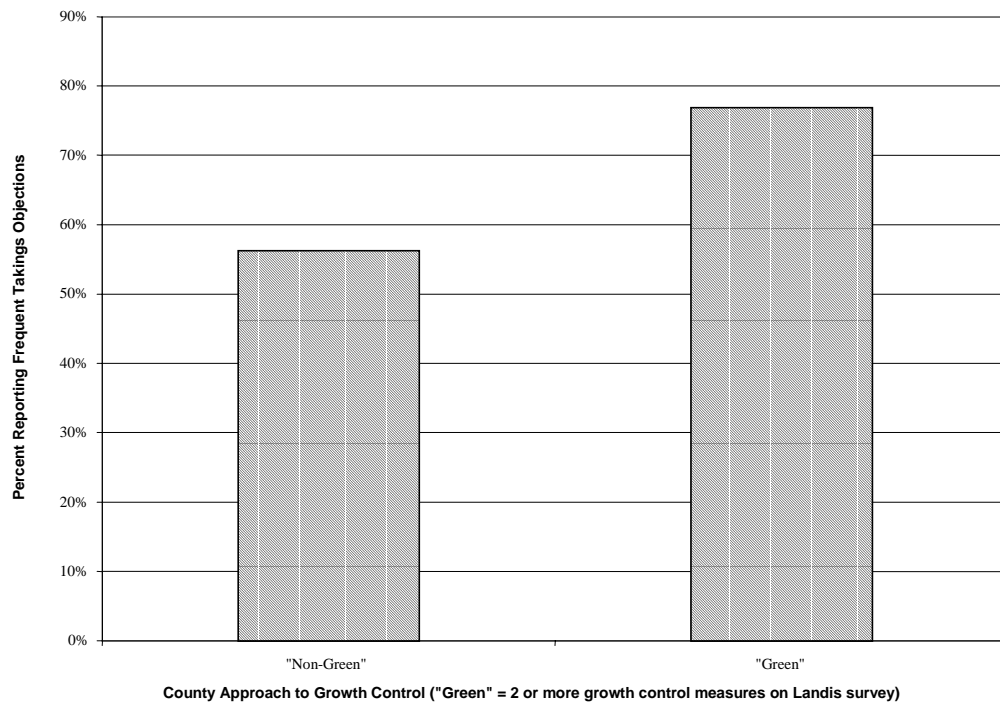


^{*} The growth control measures on the Landis survey are listed in Appendix VII.

[†] Chi-Square=4.1 (1 degree of freedom), indicating to a 96% confidence level that the distribution is non-random.

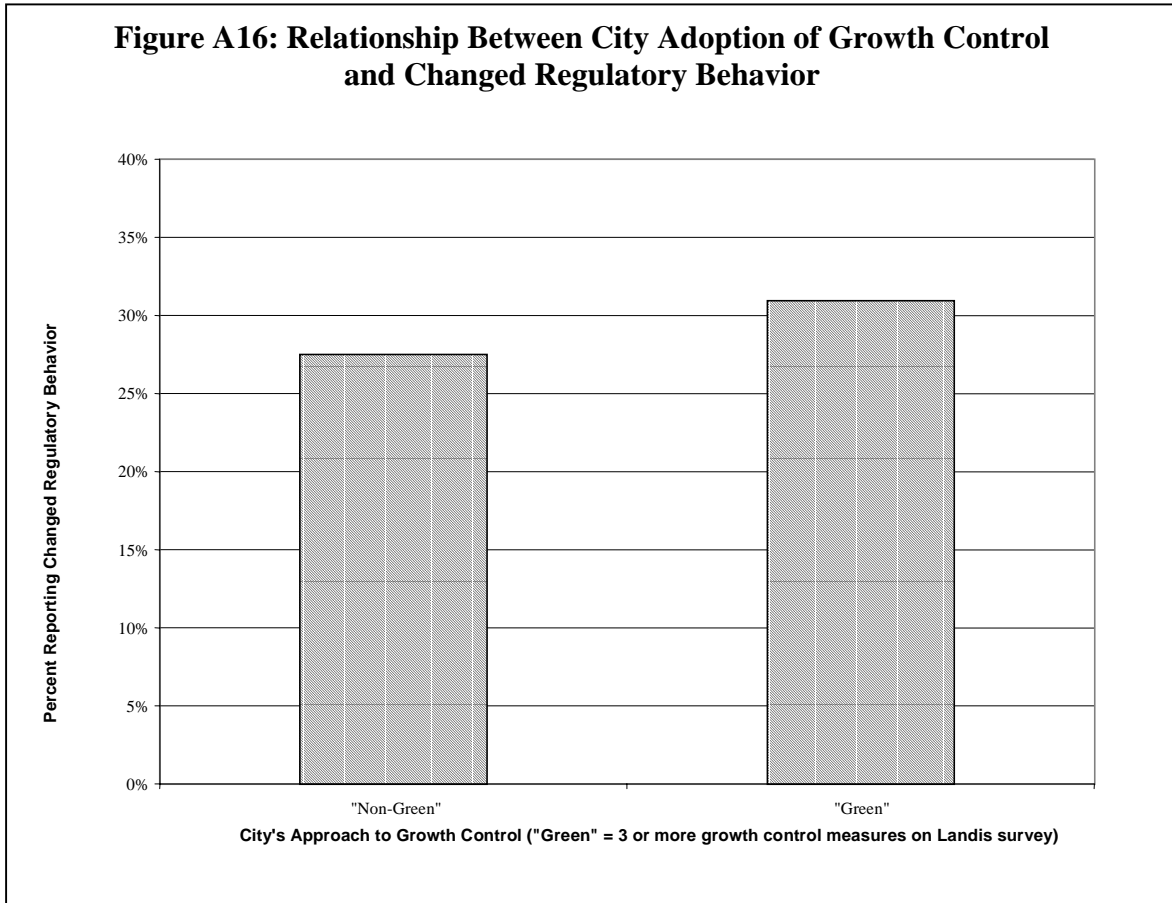
Counties exhibit a similar pattern – takings objections are more common in “green” counties (I defined “green” counties as those that had adopted two or more growth control measures on the Landis survey). It should be noted that this result for counties is not statistically significant according to the Chi-Square test.*

Figure A15: Relationship Between County Adoption of Growth Control and Frequency of Takings Objections



* Chi-Square=1.36 (1 degree of freedom), indicating to a 76% level of confidence that the distribution is non-random.

With regard to substantive changes in policies or decisions, the “green” (growth control-oriented) cities *do not* appear to be more likely than others to have made substantive changes in decisions or policies (what we have termed “changed regulatory behavior”) in response to takings concerns:

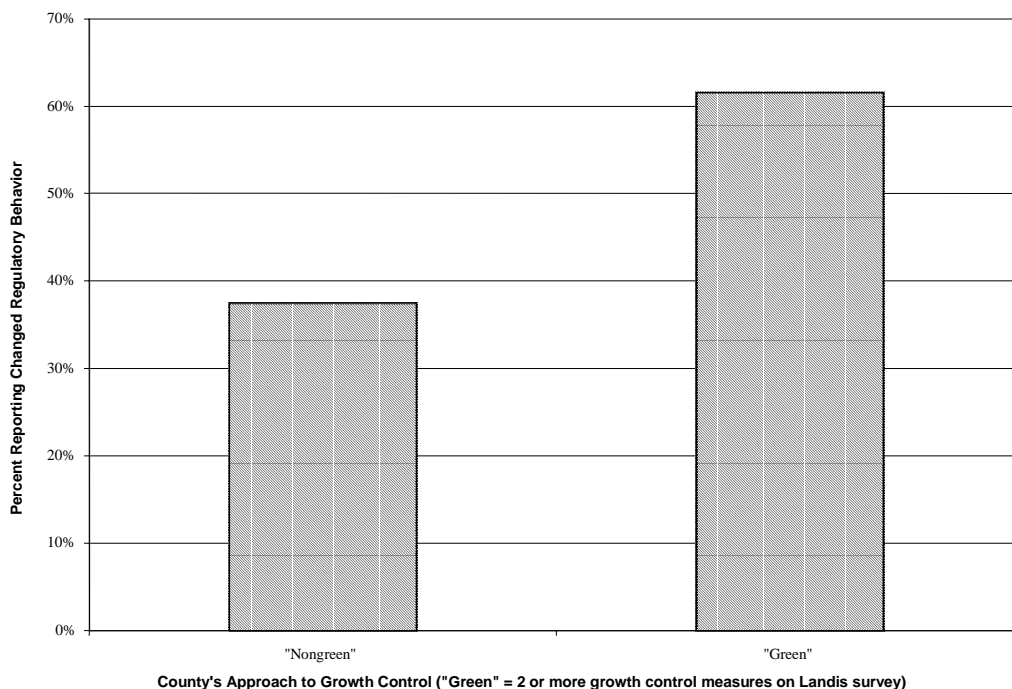


The difference above is not statistically significant.*

* Chi-Square=0.45, 2 degrees of freedom, indicating only a 20% confidence level.

Similarly, the results are inconclusive for counties. A higher proportion of “green” counties report having changed regulatory behavior in response to takings issues, but the results are not statistically significant to the 90% confidence level.* However, the correlation is strong enough to suggest that growth control and property rights issues may interact differently in counties than in cities.

Figure A17: Relationship Between County Adoption of Growth Control and Takings-Related Changes in Regulatory Behavior



Conclusion

Takings-related phenomena (takings objections and changed regulatory behavior) are correlated with city population size. Given that the survey response rate also increased with city population size, this indicates that the city results may be biased upward somewhat, disproportionately reflecting the experience of larger cities.

There did not appear to be a clear relationship between population size and takings-related phenomena among the counties, however. As for the other variables, I expected that higher residential construction rates would be associated with rapidly developing communities and would give rise to takings-related issues. The data support this as

* Chi-Square=1.66 (1 degree of freedom), indicating to an 80% confidence level that the distribution is non-random.

regards cities, but not for the counties. Population growth rate was not a good predictor of takings-related issues for either cities or counties.

I also expected that communities that had instituted strong growth control measures would have an aggressive stance toward land use regulation that could manifest itself in a higher incidence of conflict over takings issues. The data seem to support this hypothesis to a limited extent. Both cities and counties that had instituted growth control measures showed higher incidences of takings objections. Such counties (but not cities) reported a higher rate of changed regulatory behavior due to takings issues. These correlations were not always statistically significant, however.

Appendix VII: Growth Control Measures Used in Landis Survey

The index of “greenness” was based on the number of “yes” responses provided to the following questions in the Landis survey (a city or county was defined as “green” if it answered yes to three or more of the following):

- Residential construction cap in place?
- Commercial space cap in place?
- Residential APFO system in place?
- Commercial APFO system in place?
- Urban Limit Line or UGB adopted or changed?
- Limits on Annexation adopted?
- Growth Management Element adopted?
- Community-wide Down-zoning undertaken?
- Height or FAR limits changed?
- Residential fees increased?
- Land use changes subject to voter approval?
- Land use changes subject to super-majority council approval?
- Other development restrictions adopted?

ENDNOTES

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- ¹ William Fulton, *Guide to California Planning* (Point Arena, CA: Solano Press Books 1991), 6.
- ² John Echeverria, Director, Environmental Policy Project, Georgetown University Law Center, <http://www.envpoly.org>
- ³ Roger Pilon, Director, Center for Constitutional Studies, Cato Institute, Testimony before the Committee on the Judiciary, U.S. House of Representatives, February 10, 1995, <http://www.cato.org/testimony/ct-pi210.html>
- ⁴ Fulton, *Guide to California Planning*, 115.
- ⁵ Daniel J. Curtin, Jr., *California Land Use and Planning Law*, (Point Arena, CA: Solano Press Books, 1997), 1.
- ⁶ See John D. Echeverria, "A Preliminary Analysis of Del Monte Dunes," Environmental Policy Project, Georgetown University Law Center, June 10, 1999, <http://www.envpoly.org>.
- ⁷ California Government Code §§ 66000-66011.
- ⁸ Rochelle Brown, Richards, Watson & Gershon, Los Angeles, personal communication, March 10, 1999.
- ⁹ Ibid.
- ¹⁰ Mark Sellers, City Attorney, City of Thousand Oaks, personal communication, December 20, 1999.
- ¹¹ Brown, March 10, 1999.
- ¹² *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515-517, 1974; cited in Community Land Use Project, "Special Issues Under Takings Law: Findings, Fees, and Dedications," (Sacramento, CA: League of California Cities, 1999), 5.
- ¹³ California Government Code § 66498.1-66498.9.
- ¹⁴ Michael Dean, Kronick Moskowitz Tiedemann & Girard, Sacramento, personal communication, March 1, 1999.
- ¹⁵ Curtin, *Curtin's California Land Use and Planning Law*, 147-149.
- ¹⁶ Dean, March 1, 1999.
- ¹⁷ R.S. Radford, Pacific Legal Foundation, quoted in Charles McCoy, "Private Matter: The Push to Expand Property Rights Stirs Both Hopes and Fears," *Wall Street Journal*, April 4, 1995, A1.
- ¹⁸ California Government Code § 66498.1-66498.9.
- ¹⁹ AB 1600 (California Government Code §66000 *et seq.*)
- ²⁰ Terri Ferro, Director of Finance, City of Murrieta, personal communication, August 8, 1999.
- ²¹ Bob Pratte, "Building Boom May Add 100,000 People to Murrieta Area," *Riverside Press Enterprise*, January 17, 1984, B5; Mary Alice Rail Boyce, *Murrieta: Old Town, New Town*, (Murrieta, CA: Rosemar Publishing, 1995), 174-176.
- ²² City of Murrieta and City of Temecula, "Temecula/Murrieta Area Job Skills and Commuter Census, 1997-1998," http://ci.murrieta.ca.us/documents/commuter_survey/toc.html
- ²³ "California, The Endangered Dream," *Time*, November 18, 1991 (the un-named town depicted is identified as Murrieta in Boyce, *Murrieta*, 176.
- ²⁴ Boyce, *Murrieta*, 179; Ferro, August 8, 1999.
- ²⁵ RAND California Government Finance Statistics, <http://ca.rand.org/stats/govtfin/govtfin.html>;
- ²⁶ Hank Moehle, City Traffic Engineer, City of Murrieta, personal communication, August 9, 1999.
- ²⁷ County of Riverside, Project Study Report, 08-RIV-15-10.6, June 1990, Revised February 1991, 6.
- ²⁸ J.F. Davidson Associates, Inc., "Traffic Impact Study, California Oaks Plaza," TPM No. 25979, November 1991, 10, 21.
- ²⁹ Letter from G.A. Lunt, Branch Chief, Development Review, California Department of Transportation, to Steve King, Murrieta Planning Department, March 18, 1992.
- ³⁰ Memo from Stephen G. Harding, City of Murrieta Planning Director, to Murrieta Planning Commission, February 26, 1992.
- ³¹ Murrieta City Council Resolution 95-350, April 4, 1995; Memo from Ben Minamide, Murrieta Director of Public Works, to the Mayor and City Council, April 4, 1995.
- ³² City of Murrieta Planning Department, Staff Report on Revised Permit 96-003, January 24, 1996.
- ³³ Joe Lacko, J.L. Management, personal communication, August 19, 1999.

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- ³⁴ Letter from Ernest Perea, Principal Planner, City of Murrieta, to Joe Lacko, J.L. Management, April 9, 1996.
- ³⁵ Richard Standley, California Department of Transportation, Riverside, personal communication, August 6, 1999.
- ³⁶ Bob Vidor, California Department of Transportation, Los Angeles Legal Office, personal communication, August 9, 1999.
- ³⁷ Letter from Richard D. Standley, California Department of Transportation, to Ben Minamide, Director of Public Works, City of Murrieta, May 6, 1996.
- ³⁸ Memo from Ben Minamide, Director of Public Works, City of Murrieta, to file, October 3, 1996.
- ³⁹ Memo from Ben Minamide, Director of Public Works, City of Murrieta, to John Harper, City Attorney, November 18, 1996.
- ⁴⁰ Letter from John Harper, Murrieta City Attorney, to Ben Minamide, Director of Public Works, November 21, 1996.
- ⁴¹ Letter from Ben Minamide, Director of Public Works, City of Murrieta, to Dan Hollingsworth, October 10, 1996.
- ⁴² City of Murrieta, Revised Permit 96-068, September 25, 1996.
- ⁴³ Tim O'Leary, "Road Project Will Give Drivers Breathing Room," *Riverside Press Enterprise*, January 17, 1998, B1; Tim O'Leary, "2 Down, 2 More Road Jobs to Go," *Riverside Press Enterprise*, June 19, 1997, B1.
- ⁴⁴ "Multiscreen OK Delayed for Freeway Ramp Deal," *Riverside Press-Enterprise*, January 9, 1997, B2.
- ⁴⁵ Memorandum of Understanding between the City of Murrieta and J.L. Management Company, January 14, 1997.
- ⁴⁶ Ferro, August 9, 1999; Agreement of Purchase and Sale and Joint Escrow Instructions," City of Murrieta and Cal Oaks Partners, June 24, 1997.
- ⁴⁷ Ernest Perea, Planning Director, City of Murrieta, personal communication, July 13, 1999.
- ⁴⁸ Ben Minamides, Hank Moehle & Associates, personal communication, July 15, 1999.
- ⁴⁹ Santa Cruz County, "1994 Public Draft Trails Master Plan for the County of Santa Cruz" (Unapproved), Trails Advisory Committee and County of Santa Cruz Parks, Open Space and Cultural Services Department, 17.
- ⁵⁰ May Wong, "Trail Proposal Goes Before Supervisors," *Santa Cruz County Sentinel*, October 31, 1993, 1.
- ⁵¹ May Wong, "Network of Trails is Opposed," *Santa Cruz County Sentinel*, September 29, 1993, 1.
- ⁵² Ken McCrary, personal communication, June 2, 1999.
- ⁵³ Kathy Kreiger, "Trails Plan Hits Dead End; County Dumps Proposal to Use Private Land for Public Trails," *Santa Cruz County Sentinel*, January 26, 1994, 1.
- ⁵⁴ May Wong, "Unhappy Trails? Plan to Link County's Parks Marches Ahead," *Santa Cruz County Sentinel*, May 15, 1993, p. 1.
- ⁵⁵ Wong, "Unhappy Trails?"
- ⁵⁶ Colleen Monahan, personal communication, May 26, 1999.
- ⁵⁷ Santa Cruz County, "1994 Public Draft Trails Master Plan," 16.
- ⁵⁸ *Ibid.*, 13.
- ⁵⁹ Colleen Monahan, personal communication, June 8, 1999.
- ⁶⁰ Letter from Robin Shirlee Littlefield to Santa Cruz County Board of Supervisors, March 14, 1994.
- ⁶¹ Santa Cruz County, "1994 Public Draft Trails Master Plan," 3.
- ⁶² *Ibid.*, 3, 11.
- ⁶³ *Ibid.*, 9-10.
- ⁶⁴ *Ibid.*, 7.
- ⁶⁵ *Ibid.*, 7.
- ⁶⁶ May Wong, "Trail Proposal Goes Before Supervisors," *Santa Cruz County Sentinel*, October 31, 1993, 1; Kathy Kreiger, "Property Owners Win Round in Trail Battle," *Santa Cruz County Sentinel*, November 3, 1993, 1.
- ⁶⁷ Letter from Daniel Shaw, County Planning Director, and Benton Angove, County POSCS Director, October 27, 1993.
- ⁶⁸ Kreiger, "Trails Plan Hits Dead End."
- ⁶⁹ *Ibid.*
- ⁷⁰ *Ibid.*
- ⁷¹ *Ibid.*

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